Supreme Court, U.S.
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No. 98-1082

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, *Petitioner,*

v.

UNITED STATES DISTRICT COURT, *Respondent.*

HORACE EDWARDS KELLY, *Real Party In Interest*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Does the Court of Appeals' recognition that res judicata is not an absolute bar to its own reconsideration of timeliness issues erroneously resolved against a habeas petitioner in earlier mandate proceedings raise critical, unresolved legal issues that merit certiorari?

2. Does the Court of Appeals' definition of the meaning of the term "pending case" to include habeas petitioners who have filed requests for appointment of counsel present a sufficiently significant conflict with the decisions of other Circuits to merit certiorari, given the fact that the resolution of this issue: (a) is irrelevant to the ultimate outcome of this case, (b) affects a finite and diminishing number of cases, and (c) reflects still developing issues of law surrounding the interpretation of this Court's decision in Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969 (1998)?

3. Does the District Court's appropriate exercise of its discretion to toll the statute of limitations contained in 28 U.S.C. § 2244(d)(1) based on court orders that precluded the filing of a habeas petition, or for a reasonable period following litigation over the threshold issue of a habeas petitioner's competence, raise critical, unresolved legal issues that merit certiorari?

4. Does the mere fact that the District Court made its equitable tolling determination following expiration of the one year period set forth in 28 U.S.C. § 2244(d)(1) raise critical, unresolved legal issues that merit certiorari?

LIST OF PARTIES

The parties to this action are Petitioner Warden Arthur Calderon ("the Warden"), Respondent United States District Court for the Central District of California ("the District Court"), and Real Party in Interest Horace Edwards Kelly ("Mr. Kelly").

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INTRODUCTION

The Warden's certiorari petition is premised on a single, fundamental error: that the Court of Appeals is powerless to correct factual and legal errors that resulted in the dismissal of Mr. Kelly's federal habeas proceedings before he had an opportunity to file his first habeas petition. In Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (Kelly V),[1] the en banc Court of Appeals determined that Mr. Kelly should be allowed to litigate the first habeas petitions filed on his behalf in April 1998, both because the District Court had made orders that prevented Mr. Kelly from filing these petitions at any earlier date, and because the statute of limitations contained in Chapter 153 of the ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 110 Stat. 1214 ("AEDPA") was not applicable to Mr. Kelly.

In reaching this conclusion, the en banc Court of Appeals reversed an earlier panel decision in Calderon v United States District Court (Kelly), 127 F.3d 782 (9th Cir. 1997) ("Kelly III"). The Kelly III panel had granted a writ of mandamus, reversing the District Court's denial of the Warden's motion to dismiss Mr. Kelly's habeas proceedings as untimely under 28 U.S.C. § 2244(d)(1). The District Court had expressly reserved ruling on the issue of equitable tolling, holding only that the AEDPA was inapplicable to Mr. Kelly, and the Warden argued to the Kelly

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[1] Mr. Kelly was convicted and sentenced to death by the Riverside Superior Court and the San Bernardino Superior Court. The Court of Appeals has denominated as "Kelly I" and "Kelly II," the decisions of the California Supreme Court upholding those convictions on direct review. The Court of Appeals has denominated as "Kelly III," a 1997 decision granting the Warden's mandamus petition from the District Court's denial of the Warden's motion to dismiss. The Court of Appeals has denominated as "Kelly IV," a subsequent panel decision granting in part and denying in part the Warden's subsequent mandamus petition, which sought dismissal of petitions filed on Mr. Kelly's behalf in April 1998. The Court of Appeals has denominated as "Kelly V," the en banc court's decision denying this second mandamus petition. For the convenience of the Court, these same titles are employed in this Opposition.

III panel that the issue of equitable tolling was not properly before it. Nevertheless, the Kelly III panel ruled that the AEDPA was applicable to Mr. Kelly and that Mr. Kelly was not entitled to an indefinite grant of equitable tolling until he regained competence.

After the Kelly III opinion was rendered, events demonstrated that the panel had erred in ruling on equitable tolling without a factual determination on this issue from the District Court. In an order issued on June 3, 1998, the District Court ruled for the first time that prior orders, which stayed proceedings pending a determination on Mr. Kelly's competence, prevented Mr. Kelly's attorneys from filing habeas petitions on his behalf. Chief District Judge Terry J. Hatter, Jr. explained that

> what actually occurred was that this court indeed ordered a stay of all the proceeding[s] other than the issue of the Petitioner's sanity. Reasonably, it could not be expected that counsel would go forward. As critical as this court has been of prior counsel in some instances, it would be unfair to them to rule other than I intend to rule today. And it isn't just counsel that I'm concerned with, but the fairness, of course, goes directly to their client. Their client would be adversely affected if, indeed because counsel, following the court's order[...]the order, as I say, was that it would be a stay of all proceedings other than the issue of petitioner's sanity, and that is what occurred. And since that is what occurred, I'm going to grant the motion for equitable tolling.

(Transcript of June 3, 1998 Hearing in Kelly v. Calderon, CV 98-2722-TJH and CV 98-2723-TJH (C.D.Cal, June 3, 1998), attached hereto as Appendix 1, at 19.)

In light of this ruling, the correctness of the Kelly V holding on equitable tolling is not open to serious question. Moreover, as the en banc court correctly determined in Kelly V, this Court's opinion in Hohn v. United States, 118 S. Ct. 1969 (1998), required reversal of the Kelly III panel's determination that the AEDPA was applicable to Mr. Kelly, since his habeas

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proceedings had been pending and vigorously litigated on his behalf for more than three years before the enactment of that statute.[2]

The Warden's attempt to invoke the Court of Appeals' past, erroneous ruling in Kelly III to prevent Mr. Kelly from ever litigating his first federal habeas petitions finds no support in the statutes and precedents governing federal habeas proceedings and should be rejected. The Court of Appeals correctly held in Kelly V that none of the doctrines of finality applicable to habeas proceedings precluded it from revisiting the issue of equitable tolling, which could not have been definitively resolved on the limited record before the Court of Appeals in Kelly III, and that the en banc court could properly reconsider the applicability of the AEDPA in light of Hohn. Accordingly, the Warden's Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In 1986, Mr. Kelly was convicted and sentenced to death by the Riverside County Superior Court. On November 26, 1990, that conviction was affirmed by the California Supreme Court. People v. Kelly, 51 Cal.3d 931, 800 P.2d 516, 275 Cal.Rptr. 160 (1990) cert. denied, Kelly v. California, 502 U.S. 842, 112 S. Ct. 134, 116 L.Ed.2d 101 (1991) ("Kelly I"). In 1988, Mr. Kelly also was convicted and sentenced to death by the San Bernardino County Superior Court. On January 16, 1992, that conviction was affirmed by the California Supreme Court. People v. Kelly, 1 Cal.4th 495, 822 P.2d 385, 3 Cal.Rptr.2d 677 (1992) cert. denied, Kelly v. California, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) ("Kelly II").

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[2] Even if this latter determination was erroneous, it would not be a proper ground for certiorari. The en banc court's resolution of the applicability of the AEDPA is irrelevant to the ultimate outcome of the case, affects a finite and diminishing class of litigants, and reflects the still developing law on this issue that has followed this Court's decision in Hohn v. United States.

On January 13, 1993, the United States District Court for the Central District of California ("the District Court") appointed federal habeas counsel to represent Mr. Kelly in federal habeas proceedings challenging his Riverside conviction and death sentence, and his San Bernardino conviction and death sentence on June 4, 1993. However, because of Mr. Kelly's diagnosed schizophrenia, his competence was at issue.[3]

On January 6, 1995, the District Court entered an order staying proceedings on all issues other than Mr. Kelly's competence. The District Court advised Mr. Kelly's habeas counsel that they were not to undertake any work on preparation of his habeas petitions, and that they would not be paid for such work, until after these competency issues had been resolved.

Over the course of the next two and a half years, the parties engaged in continuous litigation over the issue of Mr. Kelly's competence and the best means to resolve it. The Warden repeatedly insisted that the issue of Mr. Kelly's competence had to be resolved before any habeas petitions could be filed on Mr. Kelly's behalf, and that the lack of any determination by the district court regarding Mr. Kelly's competence prevented Mr. Kelly, or anyone acting on his behalf, from filing and litigating habeas petitions. Despite continuous litigation over this issue, the District Court failed to finally resolve the question of whether or not Mr. Kelly was competent to authorize a petition to be filed on his behalf.[4] (See Docket of Proceedings Before

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[3] On August 31, 1992, Warden Daniel Vasquez declared a doubt as to Mr. Kelly's competence to be executed and proceedings commenced in Marin County Superior Court on this issue. These proceedings were suspended upon the filing of a request for federal habeas counsel, when the District Court issued an order staying Mr. Kelly's execution.

[4] In 1996, as a result of court-ordered settlement negotiations, the parties agreed that the issue of Mr. Kelly's competence would be submitted for resolution to a Marin County jury, pursuant to California's scheme for determining competence to be executed, prior to any determination of Mr. Kelly's other claims. After Mr. Kelly had gone through the process of

(continued...)

the United States District Court for the Central District of California in Kelly v. Vasquez, CV 92-5420 TJH and CV 93-2951 TJH, attached hereto as Appendix 2.)

On May 2, 1997, while the issue of Mr. Kelly's competence remained pending, the Warden moved to dismiss Mr. Kelly's habeas proceedings as untimely under the one year statute of limitations contained in Chapter 153 of the AEDPA, codified at 28 U.S.C. § 2244(d)(1). On June 17, 1997, the District Court denied the Warden's motion to dismiss, concluding that the AEDPA was inapplicable to Mr. Kelly. However, the District Court declined to resolve the issue of whether the statute of limitations contained in the AEDPA was tolled.

On July 3, 1997, the Warden filed a Petition for Writ of Mandamus seeking review of the District Court's June 17, 1997 Order denying the Warden's motion to dismiss. In his mandamus petition, the Warden argued solely that the District Court had erred in holding that the AEDPA was inapplicable to Mr. Kelly. At oral argument before the Court of Appeals, the Warden insisted that any request for equitable tolling was premature and that the issue of equitable tolling was not properly before the appellate court. (Transcript of September 5, 1997 Oral Argument before Court of Appeals in Calderon v. United States District Court, Case No. 97-70875, attached hereto as Appendix 3 at 3, 6, and 7.)

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[4](...continued)
having the federal stay lifted so an execution date could be set, the Warden suddenly announced his decision that Mr. Kelly had regained his sanity after years of serious mental illness. The Warden's good faith in reneging on this agreement is subject to question. Throughout 1996, as the statute of limitations contained in 28 U.S.C. § 2244(d)(1)(A) was ticking away, the Warden never once mentioned that he would assert the statute as a defense, despite the fact that negotiations as to the form of the competency determination continued. It was only in February of 1997, after the Warden reneged on his promise to resolve the issue of Mr. Kelly's competence through state proceedings, that the Warden even raised the statute as a potential bar.

In an order issued on August 26, 1997, the District Court again declined to determine whether or not the statute of limitations contained in the AEDPA should be equitably tolled, without prejudice to the reassertion of equitable tolling claims following the Court of Appeals' ruling on the Warden's pending mandate petition.

On September 18, 1997, a three judge panel of the Court of Appeals issued a decision granting the Warden's petition for writ of mandate. Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) cert. denied, 118 S. Ct. 1396 (1998) ("Kelly III"). The Court of Appeals concluded that the AEDPA's statute of limitations was applicable to Mr. Kelly, because he had no case pending at the time the AEDPA became effective. Id. at 785. The Court of Appeals held that the filing of a request for appointment of counsel did not commence a case under the AEDPA and that, for purposes of that statute, a case only commenced upon the filing of a habeas petition. Id.

Notwithstanding the District Court's express refusal to reach issues of equitable tolling, the Court of Appeals also concluded that an indefinite grant of equitable tolling for the period of Mr. Kelly's incompetence was not justified based on the limited record before it. Id. at 786-87. Accordingly, the Court of Appeals ordered the District Court to grant the Warden's motion to dismiss for failure to comply with the statute of limitations contained in the AEDPA. Id. The Kelly III decision noted that a claim challenging Mr. Kelly's competence to be executed could be brought at a later date, if this issue arose in the future. Id. at 787.

On February 6, 1998, the District Court dismissed Mr. Kelly's habeas proceedings and lifted the stays preventing his execution. The San Bernardino and Riverside Superior Courts both set April 14, 1998, as the date for Mr. Kelly's execution. On March 17, 1998, the Warden

notified the Marin County District Attorney that he had good reason to believe that Mr. Kelly may have become incompetent to be executed and proceedings commenced in the Marin County Superior Court on that issue.

On April 6, 1998, Mr. Kelly's current federal habeas counsel filed two petitions on his behalf challenging the constitutionality of his convictions and death sentences by the Riverside and San Bernardino Superior Courts, and also challenging Mr. Kelly's competence to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). Contemporaneously with the filing of these petitions, Mr. Kelly's current habeas counsel filed a motion for equitable tolling based on several grounds, including prior court orders that precluded the filing of a habeas petition, and for a finite period while the threshold issue of Mr. Kelly's competence was being litigated.

On May 18, 1998, the District Court denied the Warden's motion to dismiss Mr. Kelly's habeas petitions. On May 26, 1998, the Warden filed another Petition for Writ of Mandate with the Court of Appeals challenging the District Court's denial of his motion to dismiss. On June 3, 1998, following the conclusion of competency proceedings before the Marin County Superior Court, the District Court granted Mr. Kelly's motion for equitable tolling.[5] (Order, Kelly v. Calderon, Case Nos. CV 98-2722 TJH and CV 98-2723 TJH (C.D.Cal., June 3, 1998) attached hereto as Appendix 4). The District Court concluded that equitable tolling was appropriate

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[5] On May 15, 1998, a Marin County jury concluded by a vote of 9 to 3 that Mr. Kelly was competent to be executed. In its May 26, 1998 mandate petition, the Warden sought dismissal of federal habeas proceedings to clear the way for Mr. Kelly's execution under a death warrant issued by the San Bernardino Superior Court, which had set Mr. Kelly's execution for June 9, 1998. In its June 3, 1998 order, the District Court allowed the amendment of Mr. Kelly's habeas petitions to raise claims challenging the constitutionality of recently concluded state court proceedings regarding Mr. Kelly's competence to be executed.

"based on prior counsel's reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity." Id. at 1.[6]

On June 9, 1998, a three judge panel of the Court of Appeals issued an opinion that granted in part and denied in part the Warden's mandate petition. (Appendix 5 to Warden's Petition for Writ of Certiorari). The Court of Appeals held that under principles of res judicata, all arguments in favor of equitable tolling were barred by its prior decision in Kelly III. Id. at 31-33. However, the Court of Appeals held that Mr. Kelly could pursue claims that he was incompetent to be executed under Ford v. Wainwright. Id. at 34 n. 4.

On June 26, 1998, a majority of the active members of the Court of Appeals voted to rehear en banc the Warden's mandate petition, and the Kelly IV opinion was withdrawn. On December 8, 1998, by a vote of ten to one, an en banc panel of the Court of Appeals issued an opinion denying the Warden's mandate petition. Calderon v. United States District Court, 163 F.3d 530 (9th Cir. 1998) ("Kelly V").

In rejecting the Warden's request for mandamus relief, the Court of Appeals concluded that the Warden had failed to satisfy the stringent standards for mandate relief established in Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). 163 F.3d at 534-42. The Court of Appeals observed that regardless of whether or not the decision below was erroneous:

> the prejudice the State seeks to avoid cannot be avoided. A delay in Kelly's execution is inevitable. To be sure, the extent of the delay may depend on whether the district court considers only Kelly's Ford [v. Wainwright] claim, or whether it considers all of Kelly's claims. At this point, however, the special

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[6] As previously noted, a transcript of the hearing on Mr. Kelly's motion for equitable tolling is attached hereto as Appendix 1.

> need for mandamus is...vitiated, because the writ cannot really give the State the relief it desires.

Id. at 536.

The en banc court also concluded that the Warden had failed to demonstrate that the District Court's orders on his motion to dismiss and on Mr. Kelly's motion for equitable tolling were clearly erroneous. The Court of Appeals held (1) that res judicata did not bar the District Court from considering claims contained in Mr. Kelly's habeas petitions because res judicata is inapplicable to habeas proceedings; (2) that law of the case principles did not bar the en banc court from reconsidering the prior orders of a three judge panel; and (3) that Mr. Kelly's habeas petitions did not constitute an abuse of the writ or violate the AEDPA's limitations on the filing of successive petitions because they were his first habeas petitions. Id. at 537-39.

The en banc court held that Mr. Kelly's first habeas petitions were timely because, under Hohn v. United States, 118 S. Ct. 1969 (1998), his requests for appointment of counsel and stays of execution in 1992 and 1993 created habeas cases that were pending at the time the AEDPA was enacted. Id. at 539-40. As an alternative ground for its holding, the Court of Appeals concluded that the District Court did not abuse its discretion in concluding that Mr. Kelly was entitled to equitable tolling. The Court of Appeals found ample support for this decision, based upon prior court orders that precluded Mr. Kelly's counsel from filing habeas petitions. Id. at 541. The Court of Appeals also concluded that Mr. Kelly was entitled to equitable tolling for a reasonable time following a determination on his competence to authorize the filing of federal habeas petitions. Id. Finally, the en banc court concluded that the District Court's mistaken dismissal of Mr. Kelly's habeas proceedings, based on the Court of Appeals' erroneous

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conclusion that the AEDPA was inapplicable to Mr. Kelly, supplied a third ground for a grant of equitable tolling. Id. at 541-42.

REASONS FOR DENYING THE WRIT

Through his certiorari petition, the Warden seeks review of the Court of Appeals' denial of extraordinary writ relief from a non-appealable order of the District Court that fell well within the District Court's discretion under settled principles of habeas jurisprudence. In this context, the Warden's petition is a singularly inappropriate candidate for certiorari. As described in more detail below, the en banc opinion in Kelly V does not present issues of sufficient importance to merit certiorari. The central holding of Kelly V, that res judicata does not bar consideration of claims in a first habeas petition, is an unremarkable restatement of well-settled principles of habeas jurisprudence. Moreover, even if this Court wished to depart from these settled principles to announce new res judicata principles applicable to habeas petitioners, this case would be an inappropriate vehicle for such a decision. In the limited mandate proceedings before the Court of Appeals in Kelly III, Mr. Kelly did not have a full and fair opportunity to litigate issues of equitable tolling--an issue that the district court had expressly reserved ruling on.

The other holdings of Kelly V also do not merit certiorari. This Court does not need to grant certiorari to review the unremarkable proposition that equitable tolling is available when court orders prevent the filing of a habeas petition, or for a reasonable period after the litigation of issues that the parties agree must be resolved before a petition can be filed. Finally, the Kelly V decision does not create a conflict with the decisions of other Courts of Appeals on the applicability of the AEDPA that would merit certiorari.

First, the Court of Appeals' reasoning on this irrelevant to the outcome of this case, since the en banc court's decision on equitable tolling formed a sufficient basis for denial of the Warden's mandamus petition. Second, this issue is not a matter of sufficient importance to merit review, since it affects a finite and rapidly decreasing number of habeas petitioners. Lastly, there is no immediate need for this court to exercise its certiorari jurisdiction to resolve any conflict, since the law on this issue is likely to further develop. Only one other Circuit has had an opportunity to address this subject since this Court issued its decision in Hohn v. United States. See Williams v. Coyle, ___ F.3d ___, 1999 WL 65446 (6th Cir. 1999). Given that fact, other Circuits should be afforded a similar opportunity to interpret the AEDPA in light of Hohn. For all of these reasons, the Warden's certiorari petition should be denied.

ARGUMENT

I. The Court Of Appeals' Resolution of the Res Judicata Issue Does Not Merit Certiorari.

A. The Court of Appeals Correctly Concluded that Strict Principles of Res Judicata are Not Applicable to Habeas Proceedings.

In holding that it possessed the power to revisit the issue of the timeliness of Mr. Kelly's claims, the en banc court reaffirmed the "longstanding rule that res judicata has no application in habeas corpus." Kelly V, 163 F.3d at 537. See also McCleskey v. Zant, 499 U.S. 467, 479, 480 (1991) (noting that "at common law, res judicata did not attach to a court's denial of habeas relief" and that this principle was reaffirmed by the Supreme Court in Salinger v. Losiel, 265 U.S. 224, 230 (1924)). This holding is an unsurprising application of this Court's own precedents. See, e.g., Sanders v. United States, 373 U.S. 1, 7-8 (1963) ("the

familiar principle that res judicata is inapplicable to habeas proceedings" has been a principle of habeas corpus "from the earliest days of federal habeas corpus" and "has become settled in an unbroken line of decisions"). See also Schlup v. Delo, 513 U.S. 298, 320 (1995) ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata").

In place of the formal application of principles of res judicata, federal courts and Congress have adopted rules of finality in habeas proceedings through

> the gradual evolution of...formal judicial, statutory or rule based doctrines of law...[that] seek to maintain the court's freedom to issue the writ, aptly described as the 'highest safeguard of liberty,' while at the same time avoiding serious, improper delay, expense, complexity and interference with a state's interest in the finality of its own legal processes.

Lonchar v. Thomas, 517 U.S. 314, 322 (1996).

The finality of decisions made in habeas cases are protected by the law of the case doctrine and rules limiting the assertion of successive habeas petitions. See, e.g., Dobbs v. Zant, 506 U.S. 357 (1993) (manifest injustice exception to law of the case doctrine required consideration of evidence on issue resolved against petitioner on prior habeas petition); 28 U.S.C. § 2244(b) (placing limits on the filing of successive petitions); McCleskey v. Zant, 499 U.S. 467, 494 (1991) (limiting the consideration of successive petitions under the abuse of the writ doctrine). The en banc court correctly recognized that these doctrines did not prevent it from revisiting its erroneous decision in Kelly III. Kelly V, 163 F.3d at 537-39.

The Warden nevertheless urges this Court to extend principles of res judicata to preclude the District Court's consideration of Mr. Kelly's first petition, in contravention of this Court's

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own precedents. As this Court noted in Lonchar v. Thomas, such an ad hoc departure from settled rules is

> particularly inappropriate...when dismissal of a first petition is at issue. Dismissal of a first petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important issue in human liberty.

517 U.S. at 324.[7]

B. This Case is Not an Appropriate Vehicle for Reassessment of the Applicability of Res Judicata to Habeas Petitioners.

Even if this Court wished to extend principles of res judicata to create new restrictions for habeas petitioners, the unique procedural posture of this case makes the application of res judicata to Mr. Kelly singularly inappropriate. The doctrine of res judicata does not apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." Kremer v. Chemical Construction Co. 456 U.S. 461, 481 (1983).

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[7] The Warden cites Calderon v. Thompson, 118 S. Ct. 1489 (1998), as authority for the proposition that the en banc court erred in revisiting the panel decision in Kelly III. The relevance of Thompson to this case is unclear. In Thompson, the Court of Appeals issued a decision to recall its mandate after full litigation of a federal habeas petition before the District Court, the Court of Appeals, and this Court. In this case, the en banc court merely revisited a timeliness determination made on the limited record presented on the Warden's mandate petition. In contrast to the habeas petitioner in Thompson, Mr. Kelly has not "had extensive review of his claims in federal or state court." Thompson, 118 S. Ct at 1502. Due to District Court orders that prevented him from filing and litigating his first petition while the threshold issue of his competency remained unresolved, Mr. Kelly has not had any federal review of his claims. As this Court noted in Lonchar, the dismissal of a first habeas petition before Mr. Kelly has had any review of his federal claims is a particularly serious matter, which places this case in a very different posture from Thompson.

Given the limited scope of the mandamus review sought by the Warden, the Kelly III court did not and could not afford Mr. Kelly a full and fair opportunity to litigate all potential issues of equitable tolling on appeal. As the en banc court noted in Kelly V,

> It was the State that sought mandamus and set the agenda, i.e., selected the issues to be contested before the court of appeals. We think the reversal of the litigant's positions, combined with the transfer of the agenda setting power to the State, made Kelly's opportunity to respond to the petition for writ of mandate an inadequate substitute for a first habeas petition.

Kelly V, 163 F.3d at 538.

In Kelly III, the Warden petitioned for mandamus from a District Court order that held solely that the AEDPA was inapplicable to Mr. Kelly. In his petition, the Warden argued only that the District Court erred in so ruling. At oral argument before the Kelly III panel, the Warden correctly observed that the issue of equitable tolling, which was still pending before the District Court, was not properly before the Court of Appeals. Appendix 3 at 3, 6 and 7.

The Court of Appeals was empowered to affirm the district court's ruling denying the Warden's motion to dismiss on any grounds that were squarely presented by the record. Board of Trustees of Construction Laborer's Trust for Southern California v. M.M. Sundt Construction Co., 37 F.3d 1419, 1420 (9th Cir. 1994).[8] However, in the absence of any findings from the

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[8] In fact, the Kelly III Court considered and rejected the sole alternative ground presented by Petitioner's counsel in support of the District Court's ruling: that mental incompetence, standing alone, justified an indefinite grant of equitable tolling. 127 F.3d at 786-87. At oral argument, Judge Fernandez opined that he could properly reach this issue, because it constituted a pure issue of law. Judge Fernandez observed:

> [Whether lack of competence is a basis for equitable tolling] sounds to me like an almost purely legal question. The question that was actually presented to the California Supreme Court at one point is: if a person is incompetent to aid counsel in post-conviction proceedings, would or are the proceedings tolled?....That's a straight legal question. It doesn't even need any facts developed, does it?

(continued...)

District Court on the issue of equitable tolling, the Kelly III Court was not in a position to definitively resolve fact-intensive issues of equitable tolling that lay within the discretion of the District Court against Mr. Kelly, as Real Party in Interest, and against the District Court, as Respondent. See Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1206 (9th Cir. 1995) (question of equitable tolling is ordinarily a fact-intensive inquiry that often involves matters outside the pleadings) ; EEOC v. Kentucky State Police Department, 80 F.3d 1086, 1094 (6th Cir. 1996) (district court's determination on equitable tolling is entitled to review under an abuse of discretion standard); Dixon v. Shalala, 54 F.3d 1019, 1030 (2nd Cir. 1995) (same).

The grounds for equitable tolling asserted by Mr. Kelly's current counsel are highly fact-dependent and were not amenable to resolution as a matter of law by the Kelly III panel in the first instance on the limited record presented to it. Moreover, the ability of the Kelly III panel to definitively resolve these issues was thwarted by the District Court's failure to make any determinations on the appropriateness of equitable tolling.

This fact is amply demonstrated by the Kelly III panel's ineffectual debate over the meaning of the District Court's orders. In considering the District Court's January 9, 1995, order, which stayed proceedings pending a determination of Mr. Kelly's competency, the Kelly III majority took the dissent to task, insisting that there was "not the slightest hint that the order was intended to, or did, preclude the filing of a habeas corpus application by Kelly." Kelly III,

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[1](...continued)

Appendix 3 at 14-15.

In contrast, the grounds accepted by the en banc court in Kelly V involve factual issues that could not be resolved on the limited record presented on the Warden's mandamus petition in Kelly III.

127 F.3d at 787 n. 2. In reality, the panel did not and could not know the answer to this question; only the district court knew what it intended when it made this order, and how the parties could reasonably interpret its rulings in light of the extensive proceedings over the course of several years that preceded the Kelly III decision. In ruling on Mr. Kelly's subsequent motion for equitable tolling, Chief District Judge Terry J. Hatter, Jr., clarified that

> what actually occurred was that this court indeed ordered a stay of all the proceeding[s] other than the issue of the Petitioner's sanity. Reasonably, it could not be expected that counsel would go forward. As critical as this court has been of prior counsel in some instances, it would be unfair to them to rule other than I intend to rule today. And it isn't just counsel that I'm concerned with, but the fairness, of course, goes directly to their client. Their client would be adversely affected if, indeed because counsel, following the court's order[...]the order, as I say, was that it would be a stay of all proceedings other than the issue of petitioner's sanity, and that is what occurred. And since that is what occurred, I'm going to grant the motion for equitable tolling.

Appendix 1 at 19.

As this example demonstrates, in the limited context of the mandate proceedings at issue in Kelly III, Mr. Kelly could not and did not receive a full and fair opportunity to litigate equitable tolling on issues that were not clearly delineated by the limited record before the Court of Appeals. Accordingly, even if this Court wished to apply new res judicata rules to habeas petitioners, Mr. Kelly's case would not be an appropriate vehicle for such a ruling.

II. The Court Of Appeals' Resolution of the Equitable Tolling Issue Does Not Merit Certiorari.

A. The Court of Appeals' Determination of the Merits of Mr. Kelly's Equitable Tolling Claims Was Unremarkable.

The Court of Appeals' resolution of the equitable tolling issue presented to it reflects an unexceptional application of well-settled principles of law. In denying mandate from the District

Court's order on this issue, the en banc court concluded that "it was not a clear error as a matter of law for the district court to hold that Kelly's habeas petitions, filed in 1998, were not barred by the AEDPA's one-year statute of limitations." Kelly V, 163 F.3d at 541.

The Court of Appeals concluded that equitable tolling was appropriate based upon the District Court's conclusion that its own orders "prohibited Kelly's attorneys from filing a habeas petition" and for a reasonable period following a threshold determination on Mr. Kelly's competence. Id.

The District Court's use of equitable tolling in this context is unremarkable. A party may rely on a district court order, even if that order is erroneous, as a sufficient basis for equitable tolling. See, e.g., United States v. Albertini, 830 F.2d 985, 989 (9th Cir. 1987). Even when a time limitation is jurisdictional, and not simply a statute of limitations, reliance on an incorrect court order is a justification for acceptance of an otherwise untimely filing. See Thompson v. I.N.S., 375 U.S. 384, 386 (1964), citing Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962); see also Hernandez-Rivera v. I.N.S., 630 F.2d 1352, 1354 (9th Cir. 1980); United Artists Corp. v. La Cage Aux Follies, Inc., 771 F.2d 1265, 1269-1270 (9th Cir. 1985) (late filing of appeal); Browning v. American Tele. & Tele. Paradyne, 120 F.3d 222, 227 (8th Cir. 1997), citing Carlile v. South Routt School District RE 3-J, 652 F.2d 981 (10th Cir. 1981). Furthermore, if a court "lulled [petitioner] into inactivity" through its orders, tolling is appropriate. Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995).

The en banc court's conclusion that equitable tolling was appropriate for a reasonable time after resolution of the threshold issue of Mr. Kelly's competence is similarly unremarkable on the unique facts of this case. As previously noted, both the District Court and the Warden

insisted that Mr. Kelly's competency was a threshold determination that had to be adjudicated before a habeas petition could be filed. Kelly V, 163 F.3d at 541. Given this fact, it is not surprising that the Court of Appeals concluded that "it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." Id.

B. The Timing of the District Court's Ruling on Equitable Tolling Was Unobjectionable.

The Warden also objects to the timing of the District Court's order on equitable tolling, which came after the statute of limitations had expired. This objection is ironic, given the Warden's insistence at oral argument before the Court of Appeals in Kelly III that Mr. Kelly could not seek equitable tolling until after the statute of limitations had expired. Appendix 3, at 4 and 9. It is also utterly without merit. Not surprisingly, many grants of equitable tolling are made after the statute of limitations has expired. See, e.g., Bowen v. City of New York, 476 U.S. 467 (1986) (social security claimants properly moved for equitable tolling after expiration of statute of limitations); Ramadan v. Chase Manhattan Corporation, 156 F.3d 499 (9th Cir. 1998) (plaintiff properly moved for equitable tolling after Truth in Lending Act statute of limitations expired). Federal courts have expressly permitted inmates seeking equitable tolling of the AEDPA's statute of limitations to file motions after the statute of limitations otherwise would have expired. See, e.g., Miller v. New Jersey State Department of Corrections, 145 F.3d 616 (3rd Cir. 1998) (inmate was entitled to file request for extension of time to file habeas after expiration of AEDPA statute of limitations based upon equitable tolling). The Warden cites no authority, and to counsel's knowledge none exists, that suggests that this practice is in any way improper.

III. The Court of Appeals' Resolution of the Applicability of the AEDPA to Mr. Kelly Does Not Merit Certiorari.

A. This Determination is Not Sufficiently Important to Warrant Review.

1. The Court of Appeals' Determination on This Issue is Irrelevant to the Outcome of This Case.

Certiorari is not appropriate to review the applicability of the AEDPA to Mr. Kelly's case, since whatever the resolution of this issue, the decision on the merits of the Warden's claims will be the same. Assuming arguendo that the AEDPA is applicable to Mr. Kelly, his entitlement to equitable tolling of the statute of limitations based on court orders that prevented the timely filing of his petitions is not open to serious question. Thus, whether Mr. Kelly's case falls within or outside the operation of the AEDPA, the Court of Appeals correctly denied the extraordinary relief sought by the Warden.

In their treatise on Supreme Court practice, Professors Stern, Gressman, Shapiro and Geller have noted that "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of a case before the Court, certiorari may be denied." ROBERT L. STERN, EUGENE GRESSMAN, STEVEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE, § 4.4 at 173 (7th Ed. 1993). As this Court stated in Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959),

> While this Court decides issues of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the [alleged conflict among circuit court decisions]...can await a day when the issue is posed less abstractly.

Id. at 184.

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Consistent with this principle, the Warden's failure to demonstrate the existence of a dispositive conflict on the issue of the applicability of the AEDPA justifies denial of certiorari.

2. The En Banc Court's Decision is Narrow and Unique.

The Warden grossly overstates the importance and impact of that portion of the Kelly V opinion holding that Mr. Kelly's request for appointment of counsel created a "case" within the meaning of Hohn. In reality, the Hohn issue is not a matter of sufficient importance to merit review as it affects a finite and rapidly decreasing number of habeas cases.

As the en banc court recognized, "[T]his case [came to them] in an unusual procedural posture, complicated by an atypical history." Kelly V, 163 F.3d at 532. Indeed, the courts have spent most of the last several years attempting to grapple with issues unique to this case, viz., the degree to which Mr. Kelly's severe mental illness prevents him from rationally assisting his attorneys in litigating his federal habeas corpus petitions. Significantly, it was the Warden who first declared a doubt as to Mr. Kelly's competency. This factor alone separates Mr. Kelly's case from every other case in which the applicability of the AEDPA has been argued.

Finally, since the class of habeas petitioners affected by the decision of the en banc court is finite and rapidly decreasing, the mere passage of time will render this issue moot. See, e.g., Williams v. Coyle, __ F.3d __, 1999 WL 64556 (6th Cir. 1999) (Once all cases in which a petitioner initiated some habeas corpus-related legal action prior to the effective date of the AEDPA have been resolved, the point at which a § 2254 case is "filed" will become irrelevant). The Warden's portrayal of the Kelly V holding as having sweeping consequences is specious and unsupportable. In view of the limited class of cases affected by Kelly V, issuance of a writ of certiorari would bring issues before this Court that are not appropriate subjects for certiorari.

3. This Court Should Decline to Exercise its Jurisdiction to Allow The Lower Courts to Interpret the Holding in Hohn.

The court below held that Mr. Kelly's first habeas petitions were timely because, under Hohn v. United States, 118 S. Ct. 1969 (1998), his requests for appointment of counsel and applications for stay of execution in 1992 and 1993 qualified as "cases" that were pending at the time the AEDPA was enacted. Id. at 539-40. As a result, the Warden avers that a conflict now exists among the circuit courts with respect to whether an application for appointment of counsel pursuant to 21 U.S.C. § 848(q) creates a pending case within the meaning of Hohn. This purported conflict between jurisdictions is irrelevant to the outcome of the case.

The Warden correctly notes that prior to the issuance of the circuit's opinion in Kelly V, every court that ruled on the issue of whether a request for counsel and stay created a case within the meaning of 848(q) came to the contrary conclusion. See Holman v. Gilmore, 126 F.3d 876 (7th Cir.1997), cert. denied, 118 S. Ct. 1169; Williams v. Cain 125 F.3d 269 (5th Cir. 1997), cert. denied, 118 S. Ct. 2338; Nobles v. Johnson, 127 F.3d 409 (5th Cir.1997), cert. denied, 118 S. Ct. 1389; Kelly III, 127 F.3d 782, cert. denied, 118 S.Ct. 1395. The Warden pays lip service to the fact that each of these cases was decided prior to this Court's holding in Hohn. However, this fact alone is fatal to his argument and this Court should decline to exercise its jurisdiction.

On February 12, 1999, after the Warden filed the present writ of certiorari, the United States Court of Appeals for the Sixth Circuit decided Williams v. Coyle , __ F.3d __, 1999 WL 64556 (6th Cir. 1999). In Williams, the court held that a habeas case is not pending within the meaning of Lindh until the application for the writ is filed pursuant to 28 U.S.C. § 2242. Id. at 6. In rejecting the reasoning of the Ninth Circuit en banc court, the Williams panel relied in part on

Sixth Circuit precedent that the "McFarland interpretation of 'pending'...extends no further than is necessary to give effect to 21 U.S.C. § 848(q)(4)(B)." Id. at 8. As a result, the Sixth Circuit confined Hohn to its facts and limited its holding to a determination that the rejection by the district court of a certificate of appealability constitutes an appealable order. Id. at 9.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters among the federal courts of appeals. Hence a square and irreconcilable conflict is usually needed to secure review. See McElroy v. United States, 455 U.S. 642, 643 (1982); Marks v. United States, 430 U.S. 188, 189 (1977). Moreover, to merit review the conflict must also be on an important issue. See, e.g., Commissioner v. Factor, 364 U.S. 932 (1961). In this regard, the issue presented by the present case, i.e., whether a case is pending within the meaning of the AEDPA, is unlikely to recur and lacks vitality. Indeed, this Court often denies certiorari because an issue lacks vitality even when, unlike here, the issue is pending in a substantial number of similar cases. See ROBERT L. STERN, EUGENE GRESSMAN, STEVEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE, § 4.4 at 168 (7th Ed. 1993). Here, only two lower courts have had occasion to apply this Court's holding in Hohn to the statute of limitations contained in the AEDPA. Given the rapidly diminishing number of cases affected by the holding of the Ninth Circuit, this Court should decline to exercise its jurisdiction.

Finally, this Court usually permits tolerable conflicts to go unaddressed until more than two courts of appeal have considered a question. As a result, this Court should allow the issue to percolate through the lower courts before accepting it for review. See McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied when issue requires further study in lower courts before it is addressed by this Court); Gilliard v. Mississippi, 464 U.S. 867 (1983)

(this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem). For that reason, the circuits should be permitted the opportunity to fully develop and adequately frame the issues sought to be resolved by this Court before the question is accepted for review.

B. The Decision of the Court Below is Correct and in Harmony with the Precedents of This Court.

The opinion in Hohn stands for the proposition that this Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. § 2253(c). Hohn, 118 S. Ct. at 1971. In reaching this narrow holding, this Court relied on its prior decision in Ex Parte Quirin, supra. Of particular relevance to the Court of Appeals was the following passage from Hohn:

> In Ex Parte Quirin, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court....We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

118 S.Ct. at 1974.

In the wake of Hohn and specifically this Court's reliance on the holding of Ex Parte Quirin, that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," ten judges of the en banc court found Hohn's reasoning irreconcilable with its prior holdings in Calderon v. United States District Court (Beeler), 128 F.3d 1283 (9th Cir. 1997), and Kelly III.[9] There is nothing remarkable about an en banc court revisiting a prior

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[9] Judges Kozinski, Thompson and Trott, who comprised the Beeler panel, all joined in that part of Kelly V that overruled Beeler's holding that a case is pending within the meaning of

(continued...)

decision if it believes that decision to be erroneous. See, e.g., Agostini v. Felton, 117 S. Ct. 1997 (1997).

In attempting to distinguish Hohn, the Warden notes that this Court analyzed the meaning of the word "case" to determine whether it had jurisdiction over a certificate of appealability, rather than to determine the reach of the AEDPA's statute of limitations. This is a distinction without a difference. Regardless of the legal question posed, the word "case" means "a proceeding in court, a suit, or action." Blyew v. United States, 80 U.S. 581, 13 Wall. 581, 20 L.Ed. 638 (1871). We must, as Justice Holmes stated, "accept the plain meaning of plain words." United States v. Brown, 206 U.S. 240, 244 (1907). In this context, the word case retains the same meaning, regardless of whether it is used to interpret a statute of limitations or a jurisdictional issue.

The Warden also erroneously contends that unless the AEDPA is applied to habeas cases in which a request for appointment of counsel has been filed before the effective date of the Act, the purposes of the AEDPA will be thwarted. In Lindh v. Murphy, 117 S. Ct. 2059 (1997), this Court rejected a similar argument that Chapter 153 had to be applied retroactively to cases filed before the Act's effective date in order to satisfy the intentions of the AEDPA's framers. To apply Chapter 153 to individuals like Mr. Kelly, who have engaged in extensive, protracted litigation before the enactment of the AEDPA, would conflict with the essential holding of Lindh that "the new provisions of Chapter 153 generally apply only to cases filed after the Act became effective." 117 S. Ct. at 2068. In this case, Mr. Kelly engaged in continuous litigation for more

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[9](...continued)
the AEDPA only when a petition for writ of habeas corpus has been filed. 163 F.3d at 539-40; id at 542 (Thompson, J., concurring); id. at 542-44 (Silverman, J. concurring). Judge Kozinski, who authored the Beeler opinion, joined Judge Silverman's concurrence.

than three years prior to the enactment of the AEDPA. See Appendix 2. To hold that Mr. Kelly had no pending habeas case before the enactment of the AEDPA would contradict the very record of the case below. Cf., Williams v. Coyle, supra, 1998 WL 64556 at *1 (AEDPA held applicable in case in which petitioner-appellant requested counsel only six days before enactment of AEDPA).

The lone dissenting judge in Kelly V raised additional, but equally meritless objections to the en banc court's resolution of this issue. First, the dissent argued that even if Hohn and Beeler were using the word "case" to mean the exact same thing, the cases are "so factually distinguishable as to belie the argument that one has vitiated the other." Kelly V, 163 F.3d at 545. However, the dissent's reliance on the fact that a habeas petition had been ruled upon in Hohn but had been denied a certificate of appealability, while contrarily no habeas petition was filed by Mr. Kelly prior to the correlative triggering event for creation of his "case", is misplaced. The fact that the petitioner in Hohn must have already filed a petition for writ of habeas corpus in order to make a request for a certificate of appealability was not the basis for the court's determination that such a request constitutes a case.

Instead, the tie that binds Hohn and Kelly V is that neither an application for certificate of appealability nor a request for appointment of counsel should be regarded as threshold inquiries separate from the merits, but rather as judicial proceedings to resolve cases or controversies within the meaning of Article III of the Constitution. The dissent's bald assertion that a request for counsel and a stay lack adversity is without merit. Thus, the decision of the Court of Appeals, being indisputably in harmony with Hohn, leaves in its wake no special or

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important reason for this Court to review it under the standard set forth in Rule 17.1 of this Court.

CONCLUSION

The Warden's certiorari petition raises no worthy issues for review. The Kelly V decision appropriately applied long-established principles of finality governing habeas cases to determine that the en banc Court of Appeals possessed the authority to evaluate the timeliness of Mr. Kelly's first federal habeas petitions. The Court of Appeals then correctly applied well-settled principles to determine that equitable tolling was appropriate based upon prior court orders that prevented Mr. Kelly's filing of his first federal habeas petitions. The en banc court also correctly applied this Court's recent decision in Hohn v. United States to conclude that Mr. Kelly's case was not governed by the AEDPA, since Mr. Kelly had been represented by federal habeas counsel in hotly contested habeas proceedings for several years preceding the enactment of that statute.

While the Warden alleges that this last holding creates a conflict with the decisions of other Circuits that justifies certiorari, this contention lacks merit. This issue is irrelevant to the ultimate outcome of this case, since the en banc court's resolution of the equitable tolling issue is sufficient to justify its denial of the Warden's mandate request. This issue is not a matter of sufficient importance to justify certiorari, since it affects a finite and diminishing number of

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habeas petitioners. Finally, this issue does not merit certiorari, since the law on this issue is still developing in light of this Court's recent decision in Hohn v. United States.

For all of these reasons, the Warden's Petition for Writ of Certiorari should be denied.

Dated: March 2, 1999

Respectfully submitted,

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Federal Public Defender

HARRY W. SIMON
Deputy Federal Public Defender

David W. Fermino by Harry W. Simon

DAVID W. FERMINO
Deputy Federal Public Defender

Counsel for Real Party In Interest

APPENDIX 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - - - -

HONORABLE TERRY J. HATTER, CHIEF JUDGE PRESIDING

- - - - - -

HORACE EDWARD KELLY,

PETITIONER,

VS.

ARTHUR CALDERON, ETC.,

RESPONDENT.

CASE NO. CV-98-2722-TJH
CV-98-2723-TJH

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

WEDNESDAY, JUNE 3, 1998

MARY TUCKER, CSR 9308
OFFICIAL COURT REPORTER
440 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIF. 90012
213/687-0530

APPEARANCES:

FOR THE PETITIONER:

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FEDERAL PUBLIC DEFENDER
DAVID W. FERMINO
DEPUTY FEDERAL PUBLIC DEFENDER
HARRY SIMON
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FOR THE RESPONDENT:

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OFFICE OF THE ATTORNEY GENERAL
KEITH I. MOTLEY
SUPERVISING DEPUTY ATTORNEY GENERAL
110 WEST A STREET
SUITE 1100
SAN DIEGO, CALIFORNIA 92101

LOS ANGELES, CALIFORNIA; WEDNESDAY, JUNE 3, 1998

(2:00 P.M.)

THE CLERK: CIVIL 98-2722 AND CIVIL 98-2723, KELLY V. CALDERON.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MR. FERMINO: DAVID FERMINO AND HARRY SIMON, OFFICE OF THE FEDERAL PUBLIC DEFENDER ON BEHALF OF HORACE KELLY.

THE COURT: THANK YOU.

MR. MOTLEY: KEITH MOTLEY, DEPUTY ATTORNEY GENERAL FOR RESPONDENT.

THE COURT: THANK YOU, MR. MOTELY.

WHY DON'T YOU PROCEED.

MR. FERMINO: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON.

MR. FERMINO: AT THE OUTSET, WE WOULD LIKE TO ALERT THE COURT TO A COUPLE OF HOUSEKEEPING MATTERS, INCLUDING SOME, FOR LACK OF A BETTER WORD, MISTAKES WITH RESPECT TO THE AMENDED PETITION THAT WE FILED, AND WE WOULD LIKE TO HAVE THOSE MISTAKES CORRECTED.

WE MISTAKENLY INTERLINEATED CLAIM -- THE SANITY CLAIM THAT'S CONTAINED IN THE PETITION BEFORE -- THE AMENDED PETITION ON THE BELIEF THAT IT WAS IDENTICAL TO THE PROCEDURAL WRIT THAT WAS PENDING BEFORE THE CALIFORNIA SUPREME COURT. THAT CLAIM IS CONTAINED IN THE RIVERSIDE

PETITION BETWEEN PAGES 223 AND 284, AND IT IS IN VOLUME TWO OF THE SAN BERNARDINO PETITION BETWEEN PAGES 311 AND 379.

BOTH OF THOSE CLAIMS HAVE FOOTNOTES, FOOTNOTE 46 IN THE RIVERSIDE PETITION, AND FOOTNOTE 53 IN THE SAN BERNARDINO PETITION, THAT EXPLAIN OUR THEORY AS TO WHY WE INTERLINEATED THAT CLAIM. AND WHAT WE WOULD LIKE THE COURT TO DO IS TO ACCEPT FOR FILING THAT PETITION. WE WILL REFILE THE CLAIM WITHOUT THE INTERLINEATION FOR THE CONVENIENCE OF THE COURT, BUT WE WOULD LIKE THE COURT TO CONSIDER THAT CLAIM AS THE SUBSTANTIVE FORD CLAIM AND THEN THE CLAIM THAT WE APPENDED TO THE AMENDED PETITION AS THE CLAIM BROUGHT IN THE CALIFORNIA SUPREME COURT BASED ON THE SANITY PROCEEDINGS IN MARIN COUNTY.

THE COURT: ALL RIGHT.

DID YOU WISH TO BE HEARD REGARDING THIS REQUEST?

MR. MOTLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. FERMINO: MOVING ON, YOUR HONOR. THIS IS AN ABSOLUTELY GRAVE MATTER. OUR CLIENT IS SCHEDULED TO BE EXECUTED JUST AFTER MIDNIGHT ON MONDAY. AND WE ARE HERE ASKING THE COURT FOR A STAY ON THE PETITIONS AND THE FORD CLAIMS PENDING IN THIS COURT AND ON OUR MOTION FOR EQUITABLE TOLLING.

TO TAKE THOSE IN TURN, WE -- FIRST, I'D LIKE TO POINT OUT THAT THE CALIFORNIA SUPREME COURT, AS THE COURT

IS PROBABLY AWARE, DENIED BOTH THE WRIT TAKEN FROM THE SANITY PROCEEDINGS IN MARIN COUNTY, AS WELL AS THE SAN BERNARDINO HABEAS PETITION THAT WAS PENDING IN THAT COURT.

THE COURT: MR. MOTLEY WAS KIND ENOUGH TO FAX US BOTH OF THOSE RESULTS.

MR. FERMINO: AS A RESULT, YOUR HONOR, WE BELIEVE THAT THE FORD CLAIM THAT IS PENDING BEFORE THIS COURT IS NOW COMPLETELY EXHAUSTED, AND THAT A STAY CAN PROPERLY ISSUE FOR THIS COURT TO CONSIDER THAT CLAIM IN AN ORDERLY FASHION.

WE BELIEVE THAT THE BASIS FOR THAT STAY IS NOT ONLY THE MARTINEZ-VILLAREAL OPINION FROM THE UNITED STATES SUPREME COURT THAT SAYS THAT A PETITIONER IN MR. KELLY'S POSITION IS ENTITLED TO FEDERAL REVIEW OF THAT CLAIM, BUT ALSO THE NINTH CIRCUIT IN KELLY ONE SPECIFICALLY INVITED PETITIONER TO BRING THAT FORD CLAIM BACK BEFORE THIS COURT.

AND REGARDLESS OF WHAT THIS COURT'S ULTIMATE POSITION IS WITH RESPECT TO THE OTHER CLAIMS CONTAINED IN THE PETITION, AND WE WILL ADDRESS THOSE SHORTLY, WE BELIEVE THAT THE FORD CLAIM IS NOW PROPERLY BEFORE THIS COURT.

WITH RESPECT TO THE SUBSTANCE OF THAT CLAIM, THAT IS THE CLAIM THAT GOES TO THE PROCEDURAL NATURE OF THE PROCEEDINGS IN MARIN COUNTY, OUR ARGUMENT IS, YOUR HONOR, THAT THE STATE PROCESS WAS FATALLY FLAWED.

WE BELIEVE THAT THE INSTRUCTIONS THAT WERE GIVEN WERE INCORRECT AND THAT THE TRIAL COURT REFUSED TO ENTERTAIN REPEATED REQUESTS FROM COUNSEL FOR THE DEFENSE TO REQUIRE THE JURY TO APPLY A DEFINITION THAT INCLUDED A LEVEL OF COGNITION THAT WAS FAR GREATER THAN SIMPLE AWARENESS; THAT IS, KTHAT MR. KELLY HAD TO HAVE AN UNDERSTANDING BEYOND SIMPLE AWARENESS OF THE EXECUTION AND WHAT WAS TO GO OCCUR IN ITS AFTERMATH.

ADDITIONALLY, WE BELIEVE THE JURY ENGAGED IN PREJUDICIAL MISCONDUCT. THERE WERE -- THERE HAS BEEN A SUBSEQUENT JURY INVESTIGATION WHICH HAS REVEALED ALL SORTS OF PREJUDICIAL MISCONDUCT THAT THIS COURT, I BELIEVE, WOULD DISCOVER UPON REVIEW AND WOULD RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION.

OBVIOUSLY, THERE ARE OTHER PROBLEMS THAT WE HAVE DISCOVERED WITH RESPECT TO THE PROCEEDINGS AND THAT IS PRECISELY THE REASON WHY THIS COURT OUGHT TO ENTERTAIN SIGNIFICANT REVIEW OF THOSE PROCEEDINGS.

THERE IS A 3,000 PAGE TRANSCRIPT WHICH THERE -- IT IS ABSOLUTELY IMPOSSIBLE FOR THIS COURT TO TODAY MAKE A DECISION WITH RESPECT TO THE FORD CLAIM OR EVEN WITHIN TIME FOR THE DATE OF JUNE 9TH WHICH IS WHEN THE STATE OF CALIFORNIA WOULD LIKE TO PUT MR. KELLY TO DEATH.

WE HAVE DETAILED ALL OF THESE DEFICIENCIES IN THE CLAIM THAT WAS FILED BEFORE THE CALIFORNIA SUPREME COURT AS

PART OF OUR SANITY WRIT, AND THAT CLAIM IS NOW PART OF THE AMENDED PETITION BEFORE THIS COURT.

I THINK THAT THERE ARE SORT OF OVERRIDING, IF YOU WILL, ATMOSPHERIC ISSUES WITH RESPECT TO THE SANITY PROCEEDINGS THAT OCCURRED IN MARIN COUNTY. WE SHOULD BE CLEAR ABOUT WHAT IS HAPPENING HERE.

IF WE DO NOT RECEIVE A STAY, MR. KELLY WILL BE EXECUTED WITHOUT FEDERAL REVIEW OF HIS UNDERLYING CONVICTIONS, AS WELL AS THE SANITY PROCEEDINGS IN MARIN COUNTY. HE WILL BECOME THE FIRST PERSON IN THE NATION TO BE EXECUTED WITHOUT FEDERAL REVIEW. AND IT IS NOT WITHOUT ITS IRONY THAT HE WILL BE THE FIRST AFRICAN-AMERICAN IN CALIFORNIA TO BE EXECUTED SINCE ARRON MITCHELL, WHO INCIDENTALLY WAS ALSO DENIED FEDERAL REVIEW OF HIS CONVICTION AND SENTENCE.

MOVING TO THE EQUITABLE TOLLING, IF THERE AREN'T QUESTIONS FROM THE COURT. WE HAVE BROUGHT ROUGHLY SIXTY CLAIMS FOR EQUITABLE TOLLING -- EXCUSE ME, SIXTY CLAIMS FOR RELIEF IN OUR PETITION. THESE CLAIMS ARE PROPERLY BEFORE THIS COURT. THE NINTH CIRCUIT, AS I MENTIONED IN OUR PRIOR HEARINGS, DECIDED A VERY NARROW ISSUE, AND THAT WAS WHETHER INCOMPETENCY OF MR. KELLY WAS GROUNDS FOR AN INDEFINITE STAY OF THE PROCEEDINGS IN ORDER TO DETERMINE WHETHER, IF EVER, MR. KELLY WOULD BECOME SANE WITHIN THE MEANING OF THE STATUTE.

THE NINTH CIRCUIT DID NOT DECIDE ANY OTHER ISSUE, ANY OTHER BASIS. THEY DECIDED AS A MATTER OF LAW THAT MR. KELLY WAS NOT ENTITLED TO TOLLING FOR THAT REASON.

WE FILED A SUPPLEMENTAL BRIEF WITH THIS COURT WITH ADDITIONAL FACTUAL SUPPORT FOR OUR CLAIM THAT HE IS ENTITLED TO EQUITABLE TOLLING. INCLUDED IN THAT IS A TRANSCRIPT OF THE ORAL ARGUMENT THAT OCCURRED IN THE NINTH CIRCUIT WHERE RESPONDENT TOOK THE POSITION THAT WE OUGHT TO DO JUST WHAT WE ARE DOING HERE TODAY.

WE FILED A PETITION AND NOW WE ARE ASKING THIS COURT TO ENTERTAIN A MOTION FOR EQUITABLE TOLLING WITH RESPECT TO THE CLAIMS THAT ARE CONSIDERED IN THAT PETITION -- THAT ARE CONTAINED IN THAT PETITION.

THIS IS NOT UNLIKE ANY OTHER CIVIL CASE THAT COMES BEFORE THIS COURT OR ANY OTHER FEDERAL DISTRICT COURT. THAT IS, MOST STATUTE OF LIMITATIONS QUESTIONS ARISE IN THE CONTEXT OF PARTIES WHO HAVE ESSENTIALLY MISSED THE DEADLINE AND COME TO COURT HAVING FILED A COMPLAINT OF SOME KIND AND ASK THE COURT TO TOLL THE STATUTE OF LIMITATIONS TO ALLOW THEM TO FILE. WE ARE IN AN IDENTICAL POSITION. THIS COURT, I THINK, HAS THE POWER AND THE AUTHORITY TO ENTERTAIN THE MOTION AND TO GRANT EQUITABLE TOLLING WITH RESPECT TO THE CLAIMS.

THE NINTH CIRCUIT DURING THE LAST FEW WEEKS HAS GRANTED -- OR ACTUALLY DURING THE LAST WEEK, ORDERED THE

PARTIES TO BRIEF WITH -- THE WRIT THAT THE ATTORNEY GENERAL FILED FROM YOUR HONOR'S DENIAL OF THEIR MOTION TO DISMISS IN OUR LAST HEARING. WE BELIEVE THAT DOES NOT REMOVE JURISDICTION FROM THIS COURT TO ENTERTAIN OUR MOTION FOR EQUITABLE TOLLING. AND I THINK, IN FACT, THE RECORD NEEDS TO BE DEVELOPED AS TO WHAT HAPPENED IN THIS COURTROOM WHEN MR. DEBLANC AND MR. GRACE WERE REPRESENTING MR. KELLY.

YOUR HONOR IS IN THE BEST POSITION OF TELLING THE CIRCUIT, OF MAKING A RECORD AS TO WHAT YOUR ORDERS MEANT, AND WHETHER OR NOT COUNSELS' ACTIONS WERE REASONABLE IN LIGHT OF THOSE ORDERS.

SO WE BELIEVE THAT THIS COURT OUGHT TO MAKE A RECORD WITH RESPECT TO WHAT HAPPENED IN THE COURT AND WHAT HAPPENED WITH RESPECT TO THOSE CLAIMS.

IN THAT REGARD, YOUR HONOR, WE FILED WITH OUR FIRST EQUITABLE TOLLING MOTION A PROPOSED ORDER WHICH CONTAINED ROUGHLY NINE PROPOSED FINDINGS OF FACT WITH RESPECT TO WHAT OCCURRED IN THOSE PRIOR PROCEEDINGS.

I WOULD LIKE TO GO THROUGH THAT PROPOSED ORDER SO THE COURT IS AWARE OF WHAT WAS PLACED BEFORE THE COURT.

NUMBER ONE, IN FAILING TO FILE A FEDERAL HABEAS PETITION PRIOR TO APRIL 6, 1998, PETITIONER'S COUNSEL ACTED WITH DUE DILIGENCE AND REASONABLY, JUSTIFIABLY, AND IN GOOD FAITH RELIED UPON THE COURT'S PREVIOUS ORDERS AND THE REPRESENTATIONS AND ACTIONS OF RESPONDENT'S COUNSEL.

TWO, THE COURT'S ORDERS OF DECEMBER 19, 1994 AND JANUARY 9, 1995 AND JULY 17, 1995, AS WELL AS THE PLEADINGS ON FILE AND THE HEARINGS HELD IN THIS MATTER, DIRECTED PETITIONER'S COUNSEL NOT TO PREPARE ANY HABEAS CORPUS PETITIONS UNTIL AFTER THE ISSUE OF PETITIONER'S COMPETENCE HAD BEEN RESOLVED.

THREE, ON JANUARY 9, 1995, THIS COURT ORDERED AN EVALUATION OF PETITIONER'S COMPETENCY TO PROCEED, APPOINTED DR. DAVID KESSLER FOR SUCH A PURPOSE, AND STAYED ALL FURTHER PROCEEDINGS PENDING A FINAL DETERMINATION OF COMPETENCE.

FOUR, BY AND THROUGH ITS PLEADINGS AND ARGUMENTS IN THIS COURT, RESPONDENT'S COUNSEL REPRESENTED THAT PETITIONER'S COUNSEL COULD NOT FILE A HABEAS PETITION ON PETITIONER'S BEHALF UNTIL AFTER THE ISSUE OF PETITIONER'S COMPETENCE HAD BEEN RESOLVED.

FIVE, RESPONDENT'S SETTLEMENT OF THIS MATTER WITHOUT FILING A PETITION AND REPRESENTED THAT THE PARTIES WOULD RESOLVE THE ISSUE OF PETITIONER'S COMPETENCE THROUGH PROCEEDINGS IN MARIN COUNTY SUPERIOR COURT AND UNDER CALIFORNIA PENAL CODE SECTION 3701.

SIX, DURING THE PENDENCY OF THIS LITIGATION IT WAS UNCERTAIN WHETHER THE PROVISIONS OF THE NEWLY ENACTED ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIED TO PETITIONER'S CASE, OR WHETHER PETITIONER'S

INCOMPETENCY TO PROCEED WAS TOLLED DURING ANY PERIOD OF INCOMPETENCY.

AND, SEVEN, FINALLY, THESE CIRCUMSTANCES, THE ORDERS OF THIS COURT AND THE REPRESENTATIONS OF RESPONDENT'S COUNSEL, ALL LED COUNSEL TO JUSTIFIABLY BELIEVE THAT NO PETITIONS COULD BE FILED UNTIL PETITIONER'S COMPETENCY TO PROCEED WAS DETERMINED, AND THAT PROVISIONS OF THE A.E.D.P.A. DID NOT APPLY TO PETITIONER'S MATTER.

WE BELIEVE THAT'S AN ACCURATE RECITAL OF WHAT OCCURRED IN THIS COURT AND WHAT LED THE PARTIES IN THIS CASE NOT ONLY THROUGH THE ORDERS OF THIS COURT, BUT THE ACTION OF RESPONDENT, TO NOT FILE A PETITION WITHIN THE TIME THE STATUTE OF LIMITATIONS AS PRESCRIBED IN THE A.E.D.P.A., AND AS SUCH, THIS COURT SHOULD GRANT EQUITABLE TOLLING WITH RESPECT TO THOSE CLAIMS.

WE BELIEVE, YOUR HONOR, THAT THAT'S THE RIGHT THING TO DO HERE. IT IS THE JUST THING TO DO HERE. AND IT IS THE CORRECT THING TO DO UNDER THE LAW.

THE COURT: ALL RIGHT. WHY DON'T I HEAR FROM THE STATE BEFORE WE MOVE ANY FURTHER.

MR. MOTLEY: THANK YOU, YOUR HONOR.

I WILL BE VERY BRIEF BECAUSE I BELIEVE I HAVE REITERATED OUR POSITION AS TO THESE ISSUES MANY TIMES BEFORE THIS COURT.

AS TO THE CHALLENGES TO THE UNDERLYING

CONVICTIONS, IT CONTINUES TO BE OUR POSITION THAT THE NINTH CIRCUIT COURT OF APPEALS' DECISION IN ISSUING ITS WRIT OF MANDAMUS PRECLUDES THIS COURT FROM ANY FURTHER CONSIDERATION OF CHALLENGES TO THE CONVICTION.

THE COURT: TELL ME AGAIN WHY IS THAT SO.

MR. MOTLEY: BASICALLY, IT IS BECAUSE THE ISSUE PENDING BEFORE THE NINTH CIRCUIT WAS WHETHER BY MISSING THE ONE-YEAR STATUTORY DEADLINE, HE WAS PRECLUDED FROM FILING A PETITION. THAT WAS THE HOLDING OF THE NINTH CIRCUIT. THE NINTH CIRCUIT SAID IT WAS TOO LATE FOR MR. KELLY TO FILE A PETITION CHALLENGING HIS CONVICTIONS.

TO ME, THE LANGUAGE OF THE NINTH CIRCUIT COULD NOT BE CLEARER SO THAT IS THE BASIS FOR OUR ARGUMENT, YOUR HONOR.

AS TO THE ATTEMPTS TO LITIGATE THE COMPETENCY OF MR. KELLY FOR EXECUTION PURPOSES IN THIS COURT, WE DISAGREE AS TO THE APPLICATION OF MARTINEZ-VILLAREAL. IN THAT CASE, THE ISSUE AS TO SANITY FOR EXECUTION PURPOSES WAS TIMELY RAISED IN A PETITION FILED BEFORE THE COURT. THE DISTRICT COURT THEN DISMISSED THAT CLAIM AS NOT BEING RIPE FOR ADJUDICATION AND THE SUPREME COURT SAID UNDER THOSE CIRCUMSTANCES THAT CLAIM COULD LATER BE BROUGHT.

IN THIS PARTICULAR CASE, THERE WAS NO PRESENTATION OF THE SANITY FOR EXECUTION PURPOSES ISSUES BEING RAISED IN A TIMELY FIRST PETITION. AS A RESULT, IT SHOULD NOT BE

PRESENTABLE TO THIS COURT AT THIS TIME.

TO THE EXTENT THAT A FORD CLAIM MAY BE CONSIDERED BY THIS COURT, IT SHOULD BE RESTRICTED TO JUST THAT. IT SHOULD NOT BE A MINUTE EXAMINATION OF THE PROCEDURES IN MARIN COUNTY. IT IS SIMPLY WHETHER OR NOT THE FEDERAL CONSTITUTIONAL REQUIREMENTS AS SET FORTH IN FORD, NAMELY NOTICE AND THE RIGHT TO COUNSEL, THE RIGHT TO PRESENT EVIDENCE, THE RIGHT TO CROSS-EXAMINE WITNESSES, WAS MADE AVAILABLE TO MR. KELLY IN THE MARIN HEARING.

I THINK IT IS CLEAR FROM THE PLEADINGS FILED BY MR. KELLY'S COUNSEL THAT THESE BASIC REQUIREMENTS WERE MET IN THOSE PROCEEDINGS, AND AS SUCH THERE WAS NO PRIMA FACIE CASE THAT HAS BEEN MADE THAT WOULD SUPPORT A FORD HEARING IN THIS COURT AT THIS TIME.

AS TO THE--

THE COURT: IN SPITE OF THE FACT THAT THE ENTIRE PROCESS, AS I UNDERSTAND IT, UNDER THE CALIFORNIA STATUTE CALLS FOR EITHER ACTION OR INACTION OR NO ACTION TAKEN BY THE EXECUTIVE. IF THE WARDEN, FOR EXAMPLE, DETERMINED THAT HE DIDN'T WANT TO TAKE ANY ACTION THAT WOULD BE THE END OF IT. IF THE WARDEN DID, AS HE DID IN THIS CASE, STATE THAT HE WAS NOT SURE, THEREFORE, THE MATTER WENT TO THE MARIN SUPERIOR COURT, IS THAT THEN A CONSTITUTIONAL ACT ACCORDING TO THE LAW AS YOU UNDERSTAND IT?

MR. MOTLEY: YOUR HONOR, IF THE WARDEN HAD REFUSED

TO REFER THE MATTER TO MARIN COUNTY, THEN THE ISSUE WOULD BE PRESENTED BY THE FACTS. IN THIS CASE SINCE THE WARDEN DID PRESENT THE ISSUE IN MARIN COUNTY THEN THAT ISSUE AS TO THE CONSTITUTIONALITY OF THE STATUTE IS NOT AT ISSUE IN THIS COURT AT THIS TIME.

THE COURT: THAT'S YOUR UNDERSTANDING OF THE CASES?

MR. MOTLEY: YES, YOUR HONOR. I THINK IF YOU READ JUSTICE POWELL'S OPINION IN FORD V. WAINWRIGHT, HE IS QUITE CLEAR THAT THERE HAS TO BE -- THE EXECUTIVE BRANCH HAS THE ABILITY TO MAKE A THRESHOLD DETERMINATION AS TO WHETHER OR NOT TO CONDUCT A HEARING. THAT GOES UNCHALLENGED, IN THIS PARTICULAR CASE, THAT THAT WAS DONE. MR. KELLY HAS NO COMPLAINTS ALONG THAT LINE.

THE COURT: IT IS ONLY IF THE WARDEN HAD NOT ACTED; IS THAT RIGHT?

MR. MOTLEY: IN THAT CASE IT COULD BE EXAMINED, AND THEN IT WOULD BE SIMPLY A QUESTION AS TO WHETHER OR NOT KELLY HAD THE OPPORTUNITY TO PRESENT EVIDENCE TO THE WARDEN.

THE COURT: WHAT ABOUT THE DUE PROCESS PROBLEMS BEYOND THAT WITH THE TRIAL ITSELF?

MR. MOTLEY: YOUR HONOR, I DO NOT BELIEVE THAT THOSE RISE TO THE LEVEL OF A FORD CLAIM.

MY UNDERSTANDING UNDER THE DEFERENCE TO THE STATE

COURT PROCEEDINGS THAT THIS COURT HAS LIMITED JURISDICTION IN FEDERAL HABEAS CORPUS MATTERS AT THIS TIME. AND IT IS SIMPLY A QUESTION OF WHETHER THERE IS A CLEAR VIOLATION OF A BINDING UNITED STATES SUPREME COURT AUTHORITY, AND THAT SUPREME COURT AUTHORITY IS FORD V. WAINWRIGHT, AND THAT SETS FORTH MINIMUM DUE PROCESS REQUIREMENTS. AND AS LONG AS THOSE MINIMUM DUE PROCESS REQUIREMENTS HAVE BEEN MET, OUR POSITION IS THAT THE COURT SHOULD NOT EXAMINE THE HEARING FOR TRIAL COURT ERROR AS LONG AS FORD WAS MET.

FINALLY, BRIEFLY, AS TO COUNSEL'S SUGGESTION THIS COURT MAKE CERTAIN FINDINGS OF FACT. IN LISTENING TO THE RECOMMENDATIONS, I SEE THIS AS HISTORIC REVISIONISM. COUNSEL WAS NOT A PARTICIPANT IN ANY OF THESE PROCEEDINGS, AND I CERTAINLY DON'T BELIEVE IT WOULD BE APPROPRIATE FOR THIS COURT TO GO BACK AND TRY TO CREATE A RECORD. I THINK THE RECORD THAT EXISTS IS THE RECORD THAT SHOULD BE REVIEWED.

THE COURT: THAT'S RIGHT. THE RECORD WILL SPEAK FOR ITSELF.

MR. MOTLEY: IF THE COURT HAS ANY FURTHER QUESTIONS.

THE COURT: NO, I HAVE NOTHING FURTHER.

DID YOU WISH TO RESPOND BRIEFLY?

MR. FERMINO: I DO, YOUR HONOR.

THE COURT: VERY WELL.

MR. FERMINO: BRIEFLY, THREE POINTS THAT MR. MOTLEY MADE.

WITH RESPECT TO THE MARTINEZ-VILLAREAL CASE, THE POSITION THAT MR. MOTLEY TAKES WITH RESPECT TO THAT CLAIM IS IMPOSSIBLE.

IF, IN FACT, THE CLAIM HAD TO BE BROUGHT IN A TIMELY FIRST PETITION, THEN THE FACT THAT THE FORD CLAIM CAN ONLY BE BROUGHT ONCE AN EXECUTION DATE IS ISSUED MAKES IT IMPOSSIBLE TO EVER BRING A FORD CLAIM. WE COULD NOT POSSIBLY HAVE KNOWN THE FACTUAL PREDICATE FOR THIS CLAIM UNTIL THE WARDEN DECLARED A DOUBT AS TO MR. KELLY'S SANITY. AND THE NOTION THAT THIS CLAIM NEEDED TO BE BROUGHT IN AN EARLIER PETITION IN ORDER FOR THIS COURT TO ENTERTAIN IT IS JUST ABSURD.

WITH RESPECT TO FORD AND MR. MOTLEY'S FOCUS ON JUSTICE POWELL'S CONCURRENCE IN THAT CASE, IT IS ACTUALLY JUSTICE POWELL'S CONCURRENCE IN THAT CASE THAT SUPPORTS OUR POSITION HERE. JUSTICE POWELL MADE IT VERY CLEAR THAT WHAT THE COURT DIDN'T DO IN FORD WAS SET A STANDARD WITH RESPECT TO SANITY PROCEEDINGS. IT LEFT IT VERY VAGUE. AND OUR POINT HERE IS THAT THIS COURT CAN -- IS FREE IN THAT REGARD TO MAKE A RULING WITH RESPECT TO THE SANITY STANDARD EMPLOYED IN CALIFORNIA. THAT WAS THE WINDOW THAT WAS LEFT OPENED BY JUSTICE POWELL'S CONCURRENCE IN FORD.

THE COURT: BUT I HEAR YOU SUGGESTING THAT THE

COURT SHOULD EXAMINE IT CAREFULLY, AND TAKE ITS TIME TO DO SO, AND MEANWHILE ISSUE A STAY SO IT CAN CAREFULLY MAKE THAT DETERMINATION.

MR. FERMINO: THAT IS CORRECT, YOUR HONOR. I'M CERTAINLY SAYING THAT IS WITH RESPECT TO MONDAY'S EXECUTION DATE. WITH RESPECT TO HOW LONG IT TAKES THE COURT TO PROCEED, IT IS UP TO THIS COURT, BUT, CERTAINLY, IT CANNOT BE DONE BEFORE JUST AFTER THE STROKE OF MIDNIGHT ON MONDAY.

THE COURT: WE DO HAVE ANOTHER EXECUTION DATE IN JULY, I BELIEVE.

MR. FERMINO: THAT IS CORRECT.

THE LAST POINT THAT MR. MOTLEY RAISED IS THAT THE NINTH CIRCUIT OPINION WITH RESPECT TO THE MOST RESENT ORDER FROM THE CIRCUIT ON WHETHER OR NOT THESE CLAIMS ARE PROPERLY BEFORE THIS COURT, THAT IS, THAT THE COURT SAID THAT THIS COURT COULD NOT ENTERTAIN ANY FURTHER PETITIONS FROM MR. KELLY. THAT IS NOT WHAT THAT OPINION SAYS. THERE WERE NO FINDINGS MADE BY THIS COURT WITH RESPECT TO EQUITABLE TOLLING.

IN FACT, DURING ORAL ARGUMENT, JUDGE TASHIMA SPECIFICALLY ASKED MR. MOTLEY WHY -- ASKED HIM QUESTIONS ABOUT THE RECORD AND COMPLAINED THAT THE RECORD WAS SILENT WITH RESPECT TO ISSUES OF EQUITABLE TOLLING.

AND I THINK CONTRARY TO WHAT MR. MOTLEY SAID AND THE COURT'S REPLY, THERE IS A NEED TO DEVELOP A RECORD HERE

ABOUT WHAT COUNSEL REASONABLY BELIEVED THIS COURT'S ORDERS MEANT WHEN IT TOLD COUNSEL NOT TO WORK ON THIS MATTER UNTIL SANITY PROCEEDINGS COMMENCED, UNTIL THERE WAS SOME RESOLUTION OF MR. KELLY'S COMPETENCY.

AND I BELIEVE THAT THIS COURT NEEDS TO MAKE AFFIRMATIVE FINDINGS IN ORDER FOR THE CIRCUIT TO BE ABLE TO RULE ON THE QUESTION OF EQUITABLE TOLLING.

THE COURT: WHY IS IT IMPORTANT TO TRY TO GET INTO THE HEADS OF PRIOR COUNSEL AS TO WHAT THEY THOUGHT THE COURT ORDERED, RATHER THAN JUST HAVING THE RECORD INDICATE WHAT THE COURT ORDERED?

MR. FERMINO: I BELIEVE THAT THE RECORD SPEAKS FOR WHAT THE COURT ORDERED, BUT, AGAIN, IT IS CLEAR THAT THE NINTH CIRCUIT WAS NOT SATISFIED WITH WHAT WAS ON THE RECORD AND REQUIRED REALLY SOME EXPLANATION OF WHAT THIS COURT MEANT WHEN IT ASKED COUNSEL TO REFRAIN FROM WORKING ON THE CASE, AND THAT IS: WHAT WAS THE AGREEMENT BETWEEN THE PARTIES, RESPONDENT AND COUNSEL FOR MR. KELLY AND THIS COURT, WHEN THE STAYS WERE LIFTED SO THAT PROCEEDINGS COULD COMMENCE IN MARIN COUNTY OR OTHER PROCEEDINGS WITH RESPECT TO MR. KELLY'S COMPETENCY?

SO I THINK IT IS IMPORTANT FOR THIS COURT TO BE SPECIFIC ABOUT ITS RULING.

THE COURT: THANK YOU.

I STILL TEND TO BELIEVE THAT THE ATTORNEY GENERAL

IS CORRECT THAT WE SHOULD NOT GO BACK AND ATTEMPT TO RESURRECT RATHER THAN TO REVISIT WHAT ACTUALLY OCCURRED. AND WHAT ACTUALLY OCCURRED WAS THAT THIS COURT INDEED ORDERED A STAY OF ALL THE PROCEEDING OTHER THAN THE ISSUE OF THE PETITIONER'S SANITY.

REASONABLY, IT COULD NOT BE EXPECTED THAT COUNSEL WOULD GO FORWARD. AS CRITICAL AS THIS COURT HAS BEEN OF PRIOR COUNSEL IN SOME INSTANCES, IT WOULD BE UNFAIR TO THEM TO RULE OTHER THAN I INTEND TO RULE HERE TODAY.

AND IT ISN'T JUST THE COUNSEL THAT I'M CONCERNED WITH, BUT THE FAIRNESS, OF COURSE, GOES DIRECTLY TO THEIR CLIENT. THEIR CLIENT WOULD BE ADVERSELY AFFECTED IF, INDEED, BECAUSE COUNSEL, FOLLOWING THE COURT'S ORDER, THE ORDER, AS I SAY, WAS THAT IT WOULD BE A STAY OF ALL PROCEEDINGS OTHER THAN THE ISSUES OF PETITIONER'S SANITY, AND THAT IS WHAT OCCURRED.

AND SINCE THAT IS WHAT OCCURRED, I'M GOING TO GRANT THE MOTION FOR EQUITABLE TOLLING.

AND I'M FURTHER GOING TO ORDER THAT THE EX PARTE APPLICATION TO SHORTEN TIME FOR MOTION FOR LEAVE TO FILE AN AMENDED PETITION BE GRANTED, AND FURTHER GRANT THE FILING OF THAT PETITION.

AND FURTHER, I'M GOING TO GRANT THE MOTION TO STAY THE PETITIONER'S EXECUTION. AND IT WILL BE STAYED UNTIL FINAL RESOLUTION OF HIS PETITIONS.

ANYTHING FURTHER HERE TODAY?

MR. FERMINO: NOT FROM US, YOUR HONOR.

THE COURT: ALL RIGHT. MR. MOTLEY?

MR. MOTLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU.

MR. FERMINO: THANK YOU.

(PROCEEDINGS ADJOURNED.)

* * * *

I, MARY TUCKER, CSR, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS TRUE AND CORRECT

Mary Tucker 6/4/98

MARY TUCKER, CSR DATE

APPENDIX 2

PACER session date: Wednes February 11, 1998 01:17:
Case docket was last updat on: 02/06/98.

Docket as of February 6, 1998 6:38 pm Page 1

Proceedings include all events. REOPEN
2:92cv5420 Kelly v. Vasquez

REOPEN

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 92-CV-5420

Kelly v. Vasquez Filed: 09/08/92
Assigned to: Judge Terry J. Hatter
Demand: $0,000 Nature of Suit: 535
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition: Writ of H/C - State

HORACE EDWARD KELLY
petitioner

Eugene R Grace
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Albert De Blanc, Jr
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De Blanc De Blanc & Associates
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6th Floor
Los Angeles, CA 90067
310-282-7550

v.

DANIEL NMI VASQUEZ, as Warden
of San Quentin State Prison
respondent

Proceedings include all events. REOPEN
2:92cv5420 Kelly v. Vasquez

?/8/92	1	REQUEST by petitioner Horace Edward Kelly for appt of cnsl & for stay of exec. (mco) [Entry date 01/24/94]
1/15/93	9	ORDER by Judge Terry J. Hatter granting request for appt of cnsl - Crt appts Albert De Blanc, Jr as cnsl for ptr. [1-1] (mco) [Entry date 01/24/94]
6/25/93	12	NOTICE by petitioner Horace Edward Kelly of Related Case - CV 93-2951 WMB (mco) [Entry date 01/24/94]
9/16/93	15	ORDER by Judge Terry J. Hatter appt 2nd cnsl for ptr - Crt appts Eugene R. Grace as 2nd cnsl for ptr. (mco) [Entry date 01/24/94]
10/12/93	17	ORDER by Judge Terry J. Hatter staying execution date of petitioner Horace Edward Kelly till 3/9/94 (mco) [Entry date 01/24/94]
1/3/94	--	FOR ALL PREVIOUS DOCKETING, REFER TO THE PAPER DOCKET (mco) [Entry date 01/24/94]
1/21/94	18	ORDER by Judge Terry J. Hatter that given ltd funds available, the amt of cnsl's req & the fact that cnsl hs yet to file a brief, plf's cnsl shall file a more detailed decl re work performed in this mttr. (mco) [Entry date 02/02/94]
1/31/94	19	EXPARTE APPLICATION by petitioner Horace Edward Kelly for Funds to Retain an Expert. (DOC UNDER SEAL) (mco) [Entry date 02/15/94]
3/7/94	20	ORDER by Judge Terry J. Hatter th ecrt finds that the req amnt are not reasonable & thus w/not be approv. In short, this case has been over-staffed & the crt overcharged.(see fi) The crt w/not entertain CJA vouchers for wk performed by anyone other than those specifically appt by the crt, & then only if reasonable. (yc) [Entry date 03/09/94]
3/9/94	21	APPLICATION by petitioner Horace Edward Kelly for Stay of Exec to Permit Pre of h/c pet. (mco) [Entry date 03/11/94] [Edit date 03/11/94]
3/9/94	--	LODGED/PROPOSED Order re appl for stay of exec. (mco) [Entry date 03/11/94]
3/9/94	22	ORDER by Judge Terry J. Hatter granting application for ext of stay of exec.[21-1] Execution date of petitioner Horace Edward Kelly ;has been ext to 7/7/94 (mco) [Entry date 03/11/94]
6/1/94	23	ORDER by Judge Terry J. Hatter that cnsl shall not fi additiona interim CJA vouchers until the writ of H/C has been fi w/the crt. (yc) [Entry date 06/07/94]

Proceedings include all events. REOPEN
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6/1/94	24	THIRD APPLICATION by petitioner Horace Edward Kelly, for attys fees. (yc) [Entry date 06/07/94]
6/1/94	25	DECLARATION of Eugene R. Grace by petitioner Horace Edward Kelly, in ksuppt of amd first appl fr attys fees filed. **********UNDER SEAL********** (yc) [Entry date 06/14/94]
7/29/94	26	APPLICATION for stay of execution to permit prep of H/C ptn; specification of District Rule by petitioner Horace Edward Kelly (kr) [Entry date 08/02/94]
7/29/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 08/02/94]
9/8/94	27	MINUTES: ; mandatory status conference set on 10:00 9/16/94 by Judge Terry J. Hatter CR: na (yc) [Entry date 09/12/94]
9/16/94	28	MINUTES: by Judge Terry J. Hatter CR: Maria Beesley Cnsl to meet fol deadlines: Appl for appt of add l experts by 1/18/95, cmplet investigatin by 1/18/95, filing of ptn by 3/17/95, (yc) [Entry date 09/19/94]
11/29/94	29	ORDER by Judge Terry J. Hatter ; status hearing set on 10:00 12/12/94 (yc) [Entry date 12/05/94]
12/6/94	31	MINUTES: ; status hearing set on 10:00 12/19/94 by Judge Terry J. Hatter CR: na (yc) [Entry date 12/12/94]
12/8/94	30	ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edward Kelly ; set for 3/17/95 (kr) [Entry date 12/12/94]
12/19/94	32	MINUTES: crt ord all proc(S) stayed until fur ord of this crt ; status hearing held by Judge Terry J. Hatter CR: maria beesley (kr) [Entry date 01/17/95]
1/9/95	33	ORDER by Judge Terry J. Hatter, That Dr David Kessle MD be and hereby is appt to conduct a mental evaluation of the ptner of determine the fol. (see fi) That all other aspects of this case be and hereby are STAYED a final determination by this crt of the ptner mental capacity to proceed. (yc) [Entry date 02/18/95]
3/2/95	34	MOTION by petitioner Horace Edward Kelly for order to provide certain records, docs and materials t the crt apptnd competency examiner (9) individual mot for ord see file ; motion hearing set for 10:00 4/3/95 (kr) [Entry date 03/06/95]
3/2/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 03/06/95]

Proceedings include all events. REOPEN
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3/8/95	35	REQUEST by petitioner Horace Edward Kelly for vacatur of current hab corp ptn filing date and resetting of filing date to 7/14/95 (kr) [Entry date 03/10/95]
3/13/95	36	ORDER by Judge Terry J. Hatter ; IN COURT HEARING RE: Habeas copus ptn set on 7/14/95 (yc) [Entry date 03/15/95]
3/14/95	37	ORDER by Judge Terry J. Hatter, tht ptner's cnsl may provide any records, docs and material cnsl deems appropriate to Dr. David Kessler. That respondent shall rept to pnter cnsl contacts respondent or his agents hv w/ptner which relate to ptners competency. That Dr. Kessler may if he choses contract Dr. George Woods prior to Dr Kessler Exam of ptner. That Dr Woods may transmit to Dr Kessler any rpts or records that Dr. Woods believes may be helpful to Dr. Kessler, That ptner may fi any mots that his cnsl deems appropriate. That the mot be and hereby is DENIED as to all other req. (yc) [Entry date 03/16/95]
4/3/95	39	MINUTES: by Judge Terry J. Hatter CR: Maria Beesley mpot to stay procdgs pending cometency exam granted. (yc) [Entry date 04/10/95]
4/7/95	38	Ex parte APPLICATION for expert wit(S) fees for Dr. George Wood, JR. MD, decl of Eugene R. Grace; memo of p/a by petitioner Horace Edward Kelly (kr) [Entry date 04/10/95]
4/7/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 04/10/95]
5/24/95	40	MINUTES: setting hearing on motion for order to provide certain records, docs and materials t the crt apptnd competency examiner (9) individual mot for ord see file [34-1] 10:00 6/12/95 by Judge Terry J. Hatter CR: na (yc) [Entry date 06/06/95]
6/12/95	41	MINUTES: by Judge Terry J. Hatter, Matter cont to 7/17/95 at 10am. CR: Maria Beesley (yc) [Entry date 06/14/95]
6/26/95	42	position re dr. kessler's rpt (kr) [Entry date 06/29/95]
7/5/95	43	RESPONSE by petitioner Horace Edward Kelly to respondents position brief regarding Dr. Kessler rpt. (yc) [Entry date 07/11/95]
7/17/95	44	MINUTES: by Judge Terry J. Hatter, Crt hears frm cnsl. ptner to select a next friend w/in 45 days after which crt w/set a coompetency hrging. CR: Maria Beesley (yc) [Entry date 07/24/95]
8/25/95	45	Ex parte APPLICATION for ord ext time to designate next friend for ptnr by petitioner Horace Edward Kelly (kr) [Entry date 09/05/95]

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8/25/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 09/05/95]
9/5/95	47	ORDER .by Judge Terry J. Hatter, The time for petner to designate a next friend shall be ext for 90 days to 10/16/95. (yc) [Entry date 10/13/95]
10/11/95	46	Ex parte APPLICATION for ord ext time to designate next friend for ptnr; decl of Eugene R. Grace by petitioner Horace Edward Kelly (kr) [Entry date 10/12/95]
10/11/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 10/12/95]
10/13/95	48	DECLARATION of Kurt A. Schlitcher in supt of ex parte appl for ord ext time to designate next friend for ptnr by petitioner Horace Edward Kelly (kr) [Entry date 10/14/95]
10/18/95	49	ORDER ext time to designate the next friend for 91 days by Judge Terry J. Hatter (kr) [Entry date 11/03/95]
10/18/95	50	AMENDMENT by petitioner Horace Edward Kelly to [49-1] (kr) [Entry date 11/03/95]
1/5/96	51	ORDER apptng Phyllis Kelly ptnr Horace Kelly's next friend by Judge Terry J. Hatter (kr) [Entry date 01/08/96]
1/10/96	53	MINUTES: ORD that this matter is ref to Mag Judge Virginia Phillips, as successor to Mag Brown's cases, for settlement purposes by Judge Terry J. Hatter CR: none (pbap) [Entry date 01/17/96]
1/11/96	52	PROOF OF SERVICE by petitioner Horace Edward Kelly of svng conformed order appointing Phyllis Kelly petitioner Horace Kelly's next friend to Arthur Calderon, Warden, Calif. State Prison, San Quentin; Clerk of The Court Riverside County Courthouse; Grover Trask, II, district Atty's Office; Sandra Goldsmith, Deputy State Public Defender; Albert De Blanc, Esq.; Karen Schryver, Calif Appellate Project; Gary W. Schons; Horace Edward Kelly; Mary Jameson, California Supreme Court by mail on 1/10/96. (pbap) [Entry date 01/17/96]
1/30/96	54	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to amend crt ord apptn next friend ; motion hearing set for 2/26/96 (ti tkn under subm) (jc) [Entry date 02/06/96]
1/30/96	55	MTN to amd ord apptng Plyllis Kelly petr Horace Edwards Kelly's next frind by respondent Daniel NMI Vasquez (jc) [Entry date 02/06/96]

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2/20/96	56	Withdrawal of Notice of Motion to Amend Court order appointing next friend by respondent. (pbap) [Entry date 02/28/96]
3/11/96	57	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to amend Court order appointing next friend ; motion hearing set for 4/8/96 (pbap) [Entry date 03/15/96]
3/11/96	--	LODGED/PROPOSED Order (FWD TO CRD) (pbap) [Entry date 03/15/96]
3/11/96	58	MOTION by respondent Daniel NMI Vasquez to amend order appointing Phillis Kelly petner Horace Edward Kelly's next friend ; motion hearing set for 4/8/96 (pbap) [Entry date 03/15/96]
3/22/96	59	OPPOSITION to respondent's by petitioner Horace Edward Kelly to motion to amend Court order appointing next friend [57-1] (es) [Entry date 03/26/96]
3/22/96	60	Declr of Eugene R. Grace in supprt of petitioner's to respondent's opposition by petitioner Horace Edward Kelly to motion to amend Court order appointing next friend [57-1] (es) [Entry date 03/26/96]
3/28/96	61	REPLY by respondent Arthur Calderon (pbap) [Entry date 04/05/96]
3/28/96	62	DECLARATION of Michelle a. Des Jardins by respondent Arthur Calderon, Warden (pbap) [Entry date 04/05/96]
4/8/96	63	MINUTES: setting hearing on motion to amend Court order appointing next friend [57-1] 10:00 4/15/96 by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 04/19/96]
4/29/96	64	AMENDED ORDER by Judge Terry J. Hatter appointing Phyllis Kelly petner Horace Edwards Kelly's next friend. (pbap) [Entry date 05/28/96]
5/10/96	65	EXPARTE APPLI by petitioner to vacate ord requiring filing of h/c pet prior to filing appli for pymt of fees (mco) [Entry date 05/29/96]
5/10/96	--	LODGED order submitted by petitioner (FWD TO CRD) (mco) [Entry date 05/29/96]
6/11/96	67	Next friend's ex parte APPLICATION for a msc (kr) [Entry date 06/17/96]
6/12/96	66	ORDER by Judge Terry J. Hatter ; man settlement conference 3:00 7/22/96 (kr) [Entry date 06/17/96]

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6/18/96	68	NOTICE by cnsl for petitioner Horace Edward Kelly of change of address (kr) [Entry date 06/19/96]
7/22/96	69	MINUTES: ; settlement conference held; Status conf held "in camera" in crt with Pltfs cnsl presnet only re ex parte appl for fees and costs. Cnsl waive their fees and proceed pro bono and will submit voucher for paralegal's fes and costs. by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 07/25/96]
10/31/96	70	APPLICATION for stay of execution by petitioner Horace Edward Kelly (kr) [Entry date 11/01/96]
10/31/96	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 11/01/96]
10/31/96	71	ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edward Kelly ; set for <stayin exec until fur ord of this crt> (kr) [Entry date 11/21/96]
11/14/96	72	APPLICATION for expedited stat conf and case mgmt ord; decl of Eugene R. Grace by petitioner Horace Edward Kelly (kr) [Entry date 11/21/96]
11/14/96	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 11/21/96]
12/10/96	73	ORDER by Judge Terry J. Hatter granting application [72-1] ; status conf set on 10:00 12/16/96 (pbap) [Entry date 12/12/96]
12/16/96	74	MINUTES: ; status hearing held ; status hearing contd to 10:00 1/27/97 re competency of petner . Cnsl's req for app't of add'l cnsl denied. cnsl may hire a paralegal at $50 an hour by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 12/18/96]
1/21/97	75	NOTICE by petitioner of ruling & of status conf (dmjr) [Entry date 02/03/97]
2/3/97	76	MINUTES: hrg on status of ptnr's mental health & whether 1-yr rule applies to ptnr; State's opinion is that 1-yr rule is effective as of the date of filing of pet; Crt determines that Ptnr sh file pet for sanity hrg w/in 30 days. by Judge Terry J. Hatter CR: Maria Beesley (el) [Entry date 02/06/97]
3/17/97	78	NOTICE OF DISCREPANCY AND ORDER by Judge Terry J. Hatter that the ntc of motn to avoid 28 USC 254 petn filing deadline rcvd on 3/14/97 is rejected and returned to cnsl (yt) [Entry date 03/26/97]

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3/17/97	79	CERTIFICATE OF SERVICE by mail of ntc of motn to avoid 28 USC 254 petn filing deadline, etc by petitioner Horace Edward Kelly (yt) [Entry date 03/26/97]
3/20/97	77	NOTICE OF MOTION AND MOTION by petitioner Horace Edward Kelly to avoid 28 USC 254 petn filing deadline; for determination fo the app;ocability of the 1996 revisions to section 2254; for an order granting a sanity hrg re petrs ability to assist cnsl and for an indefinite stay of execution until petr can assist cnsl ; motion hearing set for 10:00 4/14/97 (yt) [Entry date 03/26/97]
3/20/97	--	LODGED/PROPOSED Order (FWD TO CRD) (yt) [Entry date 03/26/97]
3/28/97	80	OPPOSITION by respondent Daniel NMI Vasquez to motion to avoid 28 USC 254 petn filing deadline; for determination fo the app;ocability of the 1996 revisions to section 2254; for an order granting a sanity hrg re petrs ability to assist cnsl and for an indefinite stay of execution until petr can assist cnsl [77-1] (yt) [Entry date 04/02/97]
4/10/97	81	REPLY by petitioner Horace Edward Kelly to res' opp to mot [80-1] (el) [Entry date 04/14/97]
4/16/97	82	NOTICE by petitioner Horace Edward Kelly of change of address (tw) [Entry date 04/29/97]
4/21/97	83	SUPPL BRIEF FILED re motn to avoid the 28 USC 254 petn filing deadline by petitioner Horace Edward Kelly (yt) [Entry date 05/07/97]
5/2/97	84	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to dismiss the proceedings and vacate the stay of execution ; motion hearing set for 10:00 6/2/97 (yt) [Entry date 05/19/97]
5/23/97	85	OPPOSITION by petitioner Horace Edward Kelly to motion to dismiss the proceedings and vacate the stay of execution [84-1] (es) [Entry date 06/02/97]
6/17/97	86	ORDER by Judge Terry J. Hatter denying res' motion to dismiss the proceedings and vacate the stay of execution [84-1]; fur Ord thr the fi ddlns of the antiterrorism & Effective Death Penalty Act of 1996 do not apply to this case; fur Ord that ptnr's mtn for a sanity hrg sh be deemed a mtn for a competency hrg; fur Ord that ptnr's mtn for competency hrg is GRANTED; fur ORD that the competency hrg sh be held at 9:30 a.m. on 10/10/97 at San Quentin State Prison; fur Ord that Dr David Kessler sh appr at the competency hrg as the Crt's expert (el) [Entry date 06/18/97]

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7/2/97	87	MINUTES: Order re monthly CJA interim voucherspur to GO No. 97-2 (see doc for details) by Judge Terry J. Hatter CR: n/a (el) [Entry date 07/08/97]
7/24/97	--	CLERK'S record on appeal transmitted to Circuit vols: 3 (fvap)
8/6/97	88	MOTION by petitioner Horace Edward Kelly to amend the crt's ord of 6-17-97; request for expedited consideration; memo of P/A (et) [Entry date 08/08/97]
8/14/97	89	OPPOSITION by respondent Daniel NMI Vasquez to motion to amend the crt's ord of 6-17-97 [88-1] (et) [Entry date 08/15/97]
8/22/97	90	REPLY by petitioner Horace Edward Kelly re opposition to mot to amend the crt's ord of 6-17-97 [89-1] (et) [Entry date 08/25/97]
8/26/97	91	ORDER by Judge Terry J. Hatter that ptnr's motion to amend the crt's ord of 6-17-97 [88-1] is DENIED, w/ leave to renew after the Ninth Circuit has ruled on res' pending petn for a writ of mandate. (el) [Entry date 09/04/97]
8/28/97	93	9th Cir CA of Appellate Court Order: The case is sched for oral argument in Pasadena, CA, on Friday, 9/5/97, at 11:00 a.m. Argument shall be limited to twenty minutes per side. (weap) [Entry date 09/11/97]
9/4/97	92	APPLICATION for payment of fees for preparation for 10-10-97 competency hrg; declr of Eugene R. Grace by petitioner Horace Edward Kelly (et) [Entry date 09/09/97]
9/18/97	94	ORDER by Judge Terry J. Hatter that applic is granted. Ord that petnr is authorized to spend up to $4,725.00 to have Dr Woods to prepare for & testify at the competency hrg. Ord petnr is authorized to spend up to $1,775.00 to locate & interview Dr Armstrong in preparation for the competency hrg (dmjr) [Entry date 09/22/97]
9/22/97	95	ORDER by Judge Terry J. Hatter tht, peding this Crt's receipt of the 9th Circuit writ of mandate, this case be, & hereby is , CASE STAYED (et) [Entry date 09/29/97]
9/30/97	96	CC 9th Cir CA of Appellate Court Order: The crt has granted the petition for writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the crt filed on 9/18/97. (weap) [Entry date 10/03/97]
10/1/97	99	CERTIFIED COPY of Appellate Court Order: the crt has granted the ptn for Writ of Mandamus fld by petr. Now, therefore, you are directed to take such actions as is consistent with the Opinion of the crt fld on 9/18/97. (ghap)

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[Entry date 10/14/97]

10/7/97 97 CERTIFIED COPY of judgment from USCA, Crt has granted the petition for writ of mandamus fld by petitioner. Now, therefore, your are directed to take such actns as is consistent with the Opinion of the Crt fld on 9-18-97. [ENTERED 10-8-97] (cc: all counsel) (et) [Entry date 10/08/97]

10/7/97 98 ORDER by Judge Terry J. Hatter tht the mandate of the 9th CCA be, & hereby is, fld & spread on the records of this Crt. It is further ORD tht, pur to the 9th Circuit's mandate, the stays of execution be, & hereby are, Lifted. It is further ORD tht, purs to the 9th Circuit's mandate, these cases be, & hereby are, Dismissed. [ENTERED 10-08-97] Mld all cpys w/notc. MD JS-6 terminating case (et) [Entry date 10/08/97]

11/4/97 100 MINUTES: that the order of the 9th CCA filed on 10/27/97 shll be fld and spread upon the records of the court. pur to the order of the US court of appels that the order entered on 10/8/97 dism the actions and lifting the stay of execution is hereby vacated. ORD that the ececution of the deeft is stayed until fur order of the court Case reopened by Judge Terry J. Hatter CR: na (ENT 11/5/97) (yt) [Entry date 11/05/97]

11/4/97 101 COPY of Appellate Court Order: reinstating (yt) [Entry date 11/05/97]

11/4/97 102 CERTIFIED COPY of Appellate Court Order: In accordance w/writ of mandate issued by th court pursuant to its opinion of 9/18/97, dist crt lifted stays of execution & dism cases CV 92-5420 TJH & CV 93-2951 TJH on 10/7/97. In ord to preserve Kelly's rights in interim, it is now ord notwithstanding writ issued on 9/25/97, dist crt shall w/draw its ord of 10/7/97 & until further ord of th court shall reinstate cases & stays of execution, but take no further action re those cases. (pjap) [Entry date 11/13/97]

2/2/98 103 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 12/12/96;2/3/97;6/12/95;7/17/95;9/16/94;4/3/95 (Re:) CR: Maria Beesley (ghap) [Entry date 02/04/98]

2/2/98 104 TRANSCRIPT filed for proceedings held on 12/12/96 (ghap) [Entry date 02/04/98]

2/2/98 105 TRANSCRIPT filed for proceedings held on 2/3/97 (ghap) [Entry date 02/04/98]

2/2/98 106 TRANSCRIPT filed for proceedings held on 6/12/95 (ghap) [Entry date 02/04/98]

2/2/98 107 TRANSCRIPT filed for proceedings held on 07/17/95 (ghap)

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[Entry date 02/04/98]

2/2/98 108 TRANSCRIPT filed for proceedings held on 9/16/94 (ghap)
[Entry date 02/04/98]

2/2/98 109 TRANSCRIPT filed for proceedings held on 04/03/95 (ghap)
[Entry date 02/04/98]

2/2/98 110 ORDER that pur to the 9th CCA mandate the stays of execution be and are lifted...ord that the case be dism by Judge Terry J. Hatter (ENT 2/6/98) mld cpys & ntc (yt)
[Entry date 02/06/98]

[END OF DOCKET: 2:92cv5420]

PACER session date: Wedne[illegible] February[illegible]
Case docket was last updat[illegible] on: 02/06/98.

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REOPEN

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 93-CV-2951

Kelly v. Vasquez, et al Filed: 05/21/93
Assigned to: Judge Terry J. Hatter
Demand: $0,000 Nature of Suit: 535
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

HORACE EDWARDS KELLY
petitioner

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ARTHUR OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, Warden
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619-645-2001

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5/21/93	1	REQUEST by petitioner Horace Edwards Kelly for APPOINTMET OF CNSL IN CA DEATH SENTENCE CASE & STAY OF EXECUTION OF DEATH SENTENCE (am) [Entry date 05/24/93]
5/21/93	2	DECLARATION of Karen S. Schryver in Suppt of Request for Appoint of Cnsl in CA Death Sentence Case & for Stay of Exec [1-1] (mco) [Entry date 06/10/93] [Edit date 06/10/93]
5/25/93	3	NOTICE by petitioner Horace Edwards Kelly of related case(s) CV92-5420 TJH. (es) [Entry date 06/03/93] [Edit date 06/10/93]
6/3/93	4	ORDER RE TRANSFER PUR TO G.O. 224 (Related Case) by Judge Wm. M. Byrne Case reassigned to Judge Terry J. Hatter for all further proceedings(L/N CV92-5420 TJH) (cc: all counsel) (es) [Edit date 07/01/93]
6/4/93	5	ORDER by Judge Terry J. Hatter - It is ord that Albert De Blanc Jr who is cnsl for the petr in the companion case CV 92-5420 TJH is hereby appointed cnsl for the petr in this instanct act. (cc: all counsel) (mco) [Entry date 06/08/93] [Edit date 06/10/93]
6/4/93	6	ORDER Staying Execution - It is ord by Judge Terry J. Hatter that the execution date of petitioner Horace Edwards Kelly set for 7/9/93 be stayed for a period of 45 days to & including 8/23/93 (cc: counsel) (mco) [Entry date 06/08/93] [Edit date 06/10/93]
8/16/93	7	ORDER by Judge Terry J. Hatter that mot to appt 2nd cnsl is granted. It is further ord that Eugene R. Grace of Grace, Skocypec, Cosgrove & Schirm be & hereby is apptd as 2nd cnsl. [3-2] (mco) [Entry date 10/05/93]
9/16/93	8	APPLICATION by petitioner Horace Edwards Kelly for Ord to Appt 2nd Cnsl - Under Seal Doc - (mco) [Entry date 10/08/93]
9/16/93	9	ORDER by Judge Terry J. Hatter Apptn 2nd Cnsl; Recomm of Cnsl -Under Seal Doc-(cc: all counsel) (mco) [Entry date 10/08/93]
11/10/93	10	APPLICATION by petitioner Horace Edwards Kelly for Stay of Exec to Permit Prep of H/C pet. (mco) [Entry date 11/16/93]
11/10/93	--	LODGED order submitted by petitioner Horace Edwards Kelly (mco) [Entry date 11/16/93]
11/12/93	11	ORDER by Judge Terry J. Hatter granting document proposed ord ext stay of exec to & including 3-9-93. (mco) [Entry date 11/16/93]
4/4/94	12	NOTICE by respondent Arthur Calderon to change of address. (mco) [Entry date 04/06/94]

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6/1/94	13	ORDER that the court has approved the amended interim CJA vouchers...it is ORD tht cnsl shall not fiel addtl interim CJA vouchers until the writ of H/C has been fld with the court by Judge Terry J. Hatter (yt) [Entry date 06/10/94]
8/1/94	14	ORDER by Judge Consuelo B. Marshall execution stayed until date of petitioner Horace Edwards Kelly ; set for 11/4/94 (kr) [Entry date 08/02/94]
9/8/94	15	MINUTES: ; mandatory status conference set on 10:00 9/16/94 by Judge Terry J. Hatter CR: NA (yt) [Entry date 09/20/94]
9/16/94	16	MINUTES: mandatory status conference held; applic for appt of addl experts due 1/18/95; complete investigation by 1/18/95; filing of petn by 3/17/95 by Judge Terry J. Hatter CR: Maria Beesley (yt) [Entry date 09/20/94]
11/29/94	19	ORDER stat conf re the mental competency of the ptnrs is set for 12/12/94 at 10:00 am by Judge Terry J. Hatter (kr) [Entry date 01/10/95]
12/6/94	20	MINUTES: stat conf re mental comptency of plfs is resched to 12/19/94 at 10:00 am by Judge Terry J. Hatter CR: none (kr) [Entry date 01/10/95]
12/8/94	17	APPLICATION for stay of execution to permit prep of hab corp ptn; specification of iss.. by petitioner Horace Edwards Kelly (kr) [Entry date 12/09/94]
12/8/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 12/09/94]
12/8/94	18	APPLICATION for stay of execution to permit prep of hab corp ptn; specification of iss. by petitioner Horace Edwards Kelly (kr) [Entry date 12/09/94]
12/8/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 12/09/94]
12/29/94	21	MINUTES: crt ord all proc(s) stayed until fur ords of this crt. by Judge Terry J. Hatter CR: none (kr) [Entry date 01/10/95]
1/9/95	22	ORDER David Kessler is appointed to conduct a mental evaluation of ptnr, by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly ; all proc(s) are stayed until a pending final determination of ptrns mental capacity to proceed. <date not set> (kr) [Entry date 02/28/95]
3/14/95	24	ORDER ptnrs cnsl may provide any recs, docs and materials cnsl deems appropriate to Dr. Kessler, et al, mot is DENIED as to all other req. by Judge Terry J. Hatter (kr)

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[Entry date 03/28/95]

3/16/95 23 opp to mot for orders by respondent Arthur Calderon to (kr) [Entry date 03/17/95]

4/3/95 25 MINUTES: mot to stay proc(s) is pndg comp exam is Gr by Judge Terry J. Hatter CR: maria beesley (kr) [Entry date 04/17/95]

5/24/95 26 MINUTES: ; IN COURT HEARING RE: Dr. Kessler's rpt set on 10:00 6/12/95 by Judge Terry J. Hatter CR: none (kr) [Entry date 06/20/95]

7/17/95 27 MINUTES: Fur hrg re Dr. Kessler's Rep. Petr to select a "next friend' w/in 45 days after which crt will set a competency hrg by Judge Terry J. Hatter CR: Maria Beesley (lori) [Entry date 07/25/95]

9/5/95 28 ORDER ext time to designate next friend; to 10/16/95 by Judge Terry J. Hatter (kr) [Entry date 09/15/95]

4/29/96 29 AMD ORDER by Judge Terry J. Hatter appointing Phyllis Kelly petr Horace Kelly's next friend be amd to read as follows: Phyllis Kelly is appointed as next friend of petr Horace Edwards Kelly; as the next friend of petr Horace Edwards Kelly, Phyllis Kelly is auth to pursue legal actn in the name of petr and to sign any legal doc related thereto. (ab) [Entry date 05/08/96]

7/22/96 30 MINUTES: settlment conf and stat conf hld stat conf hld in camera re ex parte appl for fees and costs; cnsl waive fees and proceed pro bono and will subm voucher for paralegal fees and costs by Judge Terry J. Hatter CR: Maria Beesley (lc) [Entry date 07/25/96]

8/1/96 31 ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly is vacated (kr) [Entry date 08/05/96]

10/31/96 32 ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly ; set for staying exec until fur ord of this crt (kr) [Entry date 11/21/96]

12/10/96 33 ORDER req for an exp stat conf is GR, stat conf is sched for December 16, 1996 at 10am by Judge Terry J. Hatter (kr) [Entry date 12/16/96]

Proceedings include all events. REOPEN
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6/17/97	34	ORDER by Judge Terry J. Hatter that resp's mtn to dism & vacate the stays of exec be and hereby is, DENIED; fur Ord tht the fi ddlns for the Antiterrosism & Effective Death Penalty Act of 1996 do not apply to this case; fur Ord that ptnr's mtn for a sanity hrg sh be deemed a mtn for a competency hrg; fur Ord that ptnr's mtn for competency hrg is Granted; fur Ord that the competency hrg be held at 9:30a.m. 10/10/97 at San Quentin State Prison; fur Ord that Dr David Kessler sh appr at the competency hrg as the Crt's expert. (el) [Entry date 06/18/97] [Edit date 09/04/97]
7/2/97	35	MINUTES: Order re monthly CJA interim vouchers pur to GO No. 97-2 (see doc for details) by Judge Terry J. Hatter CR: n/a (el) [Entry date 07/08/97]
8/26/97	36	ORDER by Judge Terry J. Hatter that the ptnr's mtn to amend the Crt's Order of 7/17/97 is DENIED, w/ leave to renew it after the 9th Circuit has ruled on res' pending petn for a writ of mandate. (el) [Entry date 09/04/97]
9/18/97	37	ORDER by Judge Terry J. Hatter that the applic for funds is granted. Ord that petnr is authorized to spend up to $4,725.00 to have Dr Woods prepare for & testify at the competency hrg. Ord that petnr is authorized to spend up to $1,775.00 to locate & interview Dr Srmstrong in preparation for the competency hrg (dmjr) [Entry date 09/22/97]
9/22/97	38	ORDER by Judge Terry J. Hatter tht, pending this Crt's receipt of the 9th Circuit's writ of mandate, this case be & hereby is , CASE STAYED (et) [Entry date 09/29/97]
9/30/97	39	CC 9th Cir CA of Appellate Court Order: The crt has granted the petition for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the crt filed on 9/18/97. (weap) [Entry date 10/03/97]
10/1/97	42	CERTIFIED COPY of Appellate Court Order: the crt has granted the ptn for Writ of Mandamus fld by petr. Now, therefore, you are directed to take such actions as is consistent with the Opinion of the crt fld on 9/18/97. (ghap) [Entry date 10/14/97]
10/7/97	40	CERTIFIED COPY of judgment from USCA the Crt has granted the petn for writ of mandamus filed by petitioner. Now, therefore, your are directed to take such actns as is consistent with the Opinion of the Crt fld on 9-18-97. [ENTERED 10-8-97] (cc: all counsel) (et) [Entry date 10/08/97]

Proceedings include all events. REOPEN
2:93cv2951 Kelly v. Vasquez, et al

10/7/97	41	ORDER by Judge Terry J. Hatter tht the mandate of the 9th CCA be, & hereby is, fld & spread on the records on this Crt. It is further ORD tht, purs to the 9th Circuit's mandate, the stays of execution be, & hereby are, lifted. It is further ORD tht, pur to the 9th Circuit's mandate, these cases be, & hereby are, Dismissed. [ENTERED 10-8-97] Mld all cpys w/ntc. MD JS-6. terminating case (et) [Entry date 10/08/97]
11/4/97	43	MINUTES:that the order of the 9th CCA fld on 10/27/97 shll be fld and spread upon the records of the court. ORD tha pur to the ORD of the Court of Appeals entered on 10/8/97 dism the actions and lifting the stay of execution is hereby vacated; ord that the execution of the deft is stayed until fur order of the court; Case reopened by Judge Terry J. Hatter CR: na (ENT 11/5/97) (yt) [Entry date 11/05/97]
11/4/97	44	CERTIFIED COPY of Appellate Court Order: In accordance w/writ of mandate issued by th court pursuant to its opinion of 9/18/97, dist court lifted stays of execution & dismissed cases CV 92-5420 TJH & CV 93-2951 TJH on 10/7/97. In ord to preserve Kelly's rights in interim, it is now ord that notwithstanding writ issued on 9/25/97, dist court shall w/draw its ord of 10/7/97 & until further ord of th court shall reinstate cases & stays of execution, but take no further action regarding those cases. (pjap) [Entry date 11/13/97]
2/2/98	45	ORDER that pur to the 9th CCA mandate the stays of execution be and are lifted...ORD that the case be dism by Judge Terry J. Hatter (ENT 2/6/98) mld cpys & ntc (yt) [Entry date 02/06/98]

[END OF DOCKET: 2:93cv2951]

Wed Feb 11 13:14:55 EST 1998********** END OF CASE 2:93cv02951 **********

APPENDIX 3

DECLARATION OF HARRY SIMON

I, Harry Simon, declare:

1. I am a deputy federal public defender assigned to represent real party interest, Horace Edwards Kelly, in federal habeas proceedings pending before the United States District Court for the Central District of California. All of the facts contained in this declaration are known to me personally and if called as a witness I could and would competently testify thereto.

2. A few weeks ago, our office obtained a tape of the oral argument held before the Court of Appeals on September 5, 1998 in Calderon v. United States District Court (Kelly), Case No. 97-70785. A transcript of that tape was prepared at my direction and is appended to this declaration. I have listened to that tape and reviewed the transcript. The transcript appended to this declaration is a true and accurate reflection of the contents of that tape.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

DATED: June 2, 1998

Harry Simon

CALDERON v. USDC, Kelly

97-70785

Friday, September 5, 1997
11:00 a.m.
Courtroom 1, Pasadena

Judge Fernandez: Good morning ladies and gentleman, we are calling the matter of Calderon v. United States District Court, Kelly. Before we get started I understand there is an intent to have a Mr. Neuhoff present argument . . .

Albert DeBlanc: Yes, Good morning Your Honor, I am attorney Albert De Blanc, Jr. and I'm counsel of record as to Horace Kelly. The reason Richard Neuhoff, Mr. Neuhoff is present is because we engaged him to do the research and to write the brief in response to the Attorney General's request . . .

Judge Fernandez: Well my question is, has he or does he intend to make a formal appearance in this case. If he doesn't intend to appear formally on behalf of your client, then I really fail to see how we can allow him to present the argument . . .

Albert DeBlanc: His intent will be to formally appear, yes Your Honor . . .

Judge Fernandez: So Mr. Neuhoff, you are formally entering an appearance in this case on behalf of Mr. Kelly, is that correct?

Richard Neuhoff: Yes, Your Honor . . .

Judge Fernandez: Well you'll becoming an attorney of record, to put it bluntly correct?,

Albert DeBlanc: Thank you Your Honor . . .

Judge Hall: Is he a member of our bar? . . .

Judge Fernandez: You are a member of our bar correct?

(silence), (unintelligible)

Judge Fernandez: All right, then we will proceed first, I believe, with the Petitioner since this is a

Petition for Writ of Mandate and the person requesting it seems to me that it ought to go first . . .

Albert DeBlanc: Thank you Your Honor.

AG Keith Motley: Thank you Your Honor may I please the court, and Keith Motley, Deputy Attorney General for Petitioner Warden Calderon. I believe the threshold question presented, and I believe the definitive question is whether the trial court's decision below was clearly erroneous and our argument presented to this court has been based primarily on this court's recent decision in Beeler. In the Beeler decision, this court eventually ruled that equitable tolling would apply to the AEDPA. However, before getting to that issue, the court necessarily had to resolve the issue before this Court as to whether or not the filing of a request for counsel instituted proceedings in the district court, which it will be considered the same as the filing of a petition thereby picking this case out of the framework of the Anti-Terrorism legislation. This court in Beeler made a succinct and definite and necessary ruling that this was not so, and that the AEDPA should apply unless a Petition for Writ of Habeas Corpus had been filed in the district court. That was the act which would determine whether the Act would apply or not. We believe that . . .

Judge Fernandez: Are you referring to that footnote in Beeler particularly or . . .

Motley: Yes, Your Honor . . .

Judge Fernandez: All right . . .

Motley: And our position is that it was relegated to a footnote because the answer was so obvious and we believe that under stare decisis and under the rules of this court that the district court was obligated to honor that decision and when . . . it's not . . .

Judge Tashima: What are you saying it's not possible to read the district court's order as honoring that decision? In other words that the Act applies but it's tolled?

Motley: No, Your Honor the order of the district court was very explicit . . .

Judge Tashima: It's very brief . . . I know that.

Motley: Counsel had asked for equitable tolling and the court rejected that request . . .

Judge Tashima: Where does it show it's rejected in the record?

Motley: It does not show it in the record, Your Honor. However, counsel subsequent to the time that I filed my Petition... counsel asked the district court to reconsider its decision and to amend it to include equitable tolling, and subsequently the district court refused that request.

Judge Tashima: Well, it denied it, sort of speak, without prejudice, right?

Motley: Apparently the court below felt that it wasn't necessary to rule on it since the court was finding that the AEDPA did not apply, therefore it was not necessary to reach that issue.

Judge Tashima: Well, no there is another way to read that, you know, the trial court can say well I don't think I should change the order while it's on appeal, one way to look at it, right?

Motley: Your Honor, the court did not say that . . .

Judge Tashima: It didn't say what you said either . . .

Motley: The court explicitly said: the Act does not .

Judge Tashima: What it said on the request for their reconsideration . . .

Motley: Your Honor, I think that all we can deal with is the order that I am petitioning from was the order Wherein the district court said explicitly that the Act does not apply, and as far as I know, the district court below has not filed any responsive pleadings to our Petition for Mandate clarifying that order or explaining that order, or trying to say that the order did not state explicitly what it said.

Judge Fernandez: Well, if assuming for a moment that tolling is possible in this case, and I guess we do have to assume it's possible, to have tolling under this Act, in this case, would the theoretical possibility of tolling under the AEDPA or the actual possibility of tolling under the AEDPA make any difference to the outcome of this case?

Motley: Your Honor . . .

Judge Fernandez: As the record is presented?

Motley: Your Honor, I did not believe the tolling would be appropriate under this case under any circumstances. However, until a request is made for tolling, until the petition is filed with reasons set out as for why tolling would apply to each individual argument, that would be presented in the petition, we can't say as to whether . . . I can't respond to the arguments whether the tolling will be appropriate.

Judge Fernandez: They are suggesting, if I understand you counsel, they are suggesting this thing, this is tolled and it seems to me it's been what's been going on since this case was in the California Courts. This and all proceedings should be tolled because he is not competent. That is your position, Okay? So, suppose you grant hypothetically he is not competent, Kelly you know, Kelly may slaughter all kinds of people, but he is not competent, Okay, he just isn't. So you grant that. Does that make any difference in the facts of this case?

Motley: No, Your Honor. We have consistently argued in the district court below that Mr. Kelly's competency to assist counsel has no relevancy to the issues. Since he does not have any constitutional right to the assistance of counsel below. Therefore, it would necessarily follow that he does not have any constitutional right to be competent to assist counsel.

Judge Tashima: It's not a matter of a constitutional right. It's a matter of statutory interpretation but, if your position is correct, it would apply to Beeler, wouldn't it?

Motley: In what way Your Honor?

Judge Tashima: Well, I mean the reason he was entitled to tolling is because his attorney couldn't help him, but that would not make any difference if he has no right to counsel?

Motley: I don't believe that was the . . .

Judge Tashima: Well, what was the reason for tolling the statute in Beeler?

Motley: Because counsel left and . . .

Judge Tashima: Precisely his counsel was not available to assist him, but what difference does that make if you said he is not entitled to the assistance of counsel ...

Motley: And the tolling was for a definitive period of few months, Your Honor. In this case they are asking, if for anything, its indefinite tolling . . .

Judge Tashima: So, that's the basis to distinguish Beeler that it is for a definitive period . . .

Motley: That's one basis, yes, Your Honor.

Judge Tashima: Was there any other basis?

Motley: To the . . . well, I do not believe that Beeler considered the question as far as the necessity that competency to assist counsel. That issue was not considered at all in Beeler. I don't believe that that case would be of any assistance in resolving the underlying issue in this case. I feel that what we are entitled to is an order directing the district court to honor this Court's ruling in Beeler.

Judge Tashima: This order is so brief, it's hard to tell what the district judge meant. The operative sense is that, orders that the filing deadlines of the AEDPA do not apply. Did not say the Act doesn't apply, it says the filing deadline does not apply. That assumes that the Act applies, right? and only the deadline doesn't apply. If only the deadline doesn't isn't that a ruling that it's tolled?

Motley: No, Your Honor. The only issue before the court that was litigated at that time was whether or not the Act was applicable. The only issue that was argued by the other side to the judge was that the Act did not apply since they have requested counsel. They also requested equitable tolling but the district court below did not feel it necessary.

Judge Tashima: Well, if it is so, do you think that it will be a good case for a limited remand to the district court to find out what they really meant?

Motley: Your Honor, the district court had the opportunity and the request by counsel, to grant equitable tolling as a fall back position, and the court refused to do that.

Judge Tashima: Well, is that in the record here somewhere?

Motley: That has happened subsequent to the time that I filed the Petition Your Honor.

Judge Tashima: Are you talking about the Motion to Amend, right?

Motley: Yes, Your Honor.

Judge Tashima: And we do not know why the district court declined to amend, except, all I have is a docket. The docket says, it's denied with leave to renew after the Ninth Circuit has ruled on the Respondent's pending Petition. Which means, I think, to me that it does not want to interfere with the appellate proceedings.

Judge Fernandez: Suggests to me that the court thinks that the AEDPA does not apply period, and that's why is not going to rule.

Motley: Your Honor, I believe that the respondent has had the opportunity during the pendency of this proceedings to file pleadings on its own behalf to justify its position. If it felt it was being misrepresented by any of the parties and I think it's quite clear, since . . . from our position, that the issue is clear and succinct as to whether or not the Act applies because they requested counsel. That was the position put forth for the

district court, and the district court ruled that the Act didn't apply.

Judge Fernandez: Now, you asked, I believe your writ asked that we order the stay lifted and the cases dismissed, correct?

Motley: Yes, Your Honor.

Judge Fernandez: All right, so it seems to me that the implicit in that request is, at least from your standpoint, and you seem a little bit unsure about it as I am listening to the questions and answers. The thrust of that request is that there can't be equitable tolling, there can't be tolling in this case, on the facts of this case. Is that your position?

Motley: That is our position Your Honor, but I do not believe that is before this court. The relief we are entitled to is to a dismissal at that point in time there is nothing pending before the district court.

Judge Fernandez: Well, suppose we said well the AEDPA does not . . . back up . . . suppose this court said: Judge Hatter is wrong. The AEDPA applies to this case. The AEDPA has a one-year statute of limitations commencing to run on the date it was enacted, so far so good?

Motley: Yes, Your Honor.

Judge Fernandez: Okay, now, but suppose somebody said but wait a minute there ought to be tolling. Is it your position that, it can't be tolling because there is no Petition on file?, and if you all want to argue tolling, file a Petition or an application for habeas corpus. Is that your position?

Motley: Yes, Your Honor.

Judge Tashima: But, wasn't that the status Beeler was in? He had not filed a petition? Are we bound by Beeler in that respect?

Motley: Well, Your Honor, there was equitable tolling granted . . .

Judge Tashima: No, my question is ... just a minute you

didn't hear my question, my question is wasn't the status of Beeler that he had not filed a petition and yet we held that the statute was tolled. Is that true or not?

Motley: What this court did was agreed with the district court's decision to toll the statute prior to the time that the statute ran.

Judge Tashima: Or even before a Petition was filed, right?

Motley: That's true . . .

Judge Tashima: Necessarily it has to be . . .

Motley: But the Judge ruled during the period of time on which the court had jurisdiction over the matter.

Judge Tashima: Necessarily, it has to be before a Petition was filed, right?
Otherwise, you don't have to toll the statute if . . .

Motley: We are not disagreeing with the McFarland or the fact that the court has jurisdiction to issue orders prior to the findings of the Petition. What we are saying is that they have a window of jurisdiction of one year at this point in time. Once you get outside that period of time, as we have here, the trial . . .

Judge Tashima: Isn't that contrary to Beeler?

Motley: No, Your Honor.

Judge Tashima: Beeler said that you have more than one year.

Motley: No, Your Honor.

Judge Tashima: Does it?

Motley: Your Honor, what the judge ruled within the one year to extend the period by using of equitable tolling.

Judge Tashima: And Judge Hatter did not rule within one year?

Motley: That's true.

Judge Tashima: You mean, that the year have past by June 17 of 1997?

Motley: Yes.

Judge Tashima: It's too late to make that ruling after the year have past, is that your position?

Motley: That's our position.

Judge Fernandez: Unless they file a Petition?

Motley: That's true, they can always file a Petition and request equitable tolling. At that point in time, the matter would be considered and then we can respond to it. I think that our arguments would be successful and that it would not be appropriate.

Judge Tashima: By the way, let me ask you, you know, throughout these proceedings every once in a while the Judge seemed to order some kind of a mental exam, I guess it's never been held, is that right? Mental exam by Dr. Kessler?

Motley: Dr. Kessler examined the . . .

Judge Tashima: The petitioner . . .

Motley: . . . several years ago, and the court has the competency hearing pending now in October. However, that is directed towards his competency to assist counsel, and our position has been consistently that this is irrelevant to the proceedings.

Judge Tashima: The hearing is on the issue of whether Kelly is competent to assist counsel, is that . . .

Motley: That's correct.

Judge Tashima: It that the limited purpose of the competency hearing?

Motley: That's correct.

Judge Tashima: Thank you.

Motley: If I could Your Honor, I would like to reserve my remaining time to rebut the arguments made . . .

Judge Fernandez: You may.

Motley: Thank you.

Neuhoff: Thank you Your Honor, may I please the court. I'll start by addressing Beeler, the footnote in Beeler. I want to say four things about the footnote. (1) It's dictum. The court could have . . . would have come up the same way no matter how it decided the issue in the footnote, (2) Beeler decision did not consider any of the points that we have made in our brief to this Court as to what Congress' intent was as to the meaning of "cases pending". I think it is pretty established law that decisions of this court or any court are not authority for propositions not considered, (3) even if you felt yourself in someway, (3) there was a petition for a rehearing pending precisely on the Beeler footnote, and a request for a rehearing en banc, so that is not final language yet, that was pointed out in our brief in a footnote . . . we pointed that out . . .

Judge Fernandez: Well, it's binding on us at this point, is it not?

Neuhoff: I don't believe it's binding on you (a) for that because it is not final and (b) for other reason that since Beeler was handed, the U.S. Supreme Court came down in Lindh and came out with language that is inconsistent with the Beeler footnote...

Judge Fernandez: I think you misunderstand what's binding upon us. Because even when a case has gone en banc, has been taken en banc, the ruling of the panel, we consider binding on other panels in the 9th Circuit until such time as it gets overturned by the en banc court.

Neuhoff: I don't think that would be true of dictum, No. 1; No. 2 is I also believe ...

Judge Fernandez: Well, that dictum is never true of dictum. If the case is final, solid, etc. etc. one can always say its dictum. You don't have to follow it. So that doesn't help as much.

Neuhoff: The second one is ...

Judge Tashima: Is it dictum?

Neuhoff: Yes, sir, Yes, Your Honor.

Judge Tashima: This footnote?

Neuhoff: Yes.

Judge Tashima: You're still talking about the footnote, right?

Neuhoff: Yes.

Judge Tashima: All right. And you also said something about it is inconsistent with Lindh?

Neuhoff: Yes.

Judge Tashima: In what way?

Neuhoff: Because in the end of Lindh and the way I talked about it in the brief, Lindh describes the appointment of counsel under 848(q) which is what we have had in this case as a "pending case" under § 107(c) of the Act which is the precise provision at issue here.

Judge Tashima: Under what section?

Neuhoff: Lindh describes the appointment of counsel under 21 U.S.C. 848(q)4,(b), where they use the word "post conviction proceedings." Lindh says that appointment of counsel is a pending case under . . . makes the case a pending case under the 1996 Act. I only have the Westlaw cite for that. I don't have the official cite. It was in my brief.

Judge Fernandez: What's the Westlaw cite?

Neuhoff: Excuse me?

Judge Fernandez: The Westlaw cite?

Neuhoff: Right.

Judge Fernandez: I want to talk about dicta. Lindh wasn't dealing with that sort of case ...

Neuhoff: Absolutely not, but it described ...

Judge Fernandez: Anyway, what's the cite?

Neuhoff: It's 1997 Westlaw 338658*8.

Judge Tashima: You brief as 338568?

Neuhoff: Did I say something different from that?

Judge Tashima: I thought you said 668.

Neuhoff: I meant to say what my brief says, since I'm ...

Judge Tashima: Star 5.

Neuhoff: Star 8, at this point. I'm at page eight of my brief.

Judge Fernandez: Now you understand that Lindh stated the question before the court was whether the Act governed applications in non-capital cases that were already pending. Applications pending, correct?

Neuhoff: Huh.

Judge Fernandez: That's the issue before the court as the court stated it.

Neuhoff: Right. That's right. That's what is stated in the opening sentence. It used the word application five times in its opinion and it used the word cases pending 58 times.

Judge Fernandez: Correct. Which indicates probably it wasn't exactly focusing on that problem, correct?

Neuhoff: But it wouldn't have ... it couldn't...it was probably not focusing on that problem, huh, but to the same extent that it wasn't focusing on ... it also said in that very same sentence, the court is talking about, that the issue in this case is whether it governs applications in non-capital cases and were obviously going to apply Lindh to this capital case, even though Lindh was an issue ...

Judge Fernandez: Well, of course, we can't use the special non-capital case provisions for reasons that we all understand in California, right?

Judge Fernandez: So, naturally, the non-capital apply to this capital case because this is a non-capital

case as far as the provisions of the Act are concerned, correct?

Neuhoff: No. No, Chapter 154 applies equally to capital and non-capital cases. It doesn't...your talking about Chapter 154 which applies specially to capital cases from certain jurisdictions, right?

Judge Fernandez: Correct.

Neuhoff: Right.

Judge Tashima: Mr. Neuhoff, what about, I assume you have another part of your argument. Suppose, suppose, we don't agree that this is a pending case. In other words, that the AEDPA does apply to this case. Your position then is what?

Neuhoff: Well, at that point, this Court is entitled to and out to, if there is any ground appearing in the record from which the district court's decision and its exercise of discretion can be upheld then the court can deny the writ on that basis and another ground here is equitable tolling.

Judge Tashima: What appears in the record?

Neuhoff: What appears in the record ...

Judge Tashima: To support that?

Neuhoff: Excuse me?

Judge Tashima: What appears in the record to support that?

Neuhoff: What appears in the record is that the district court has before it prima facie evidence, at least, that Mr. Kelly is: (a) incompetent to proceed and assist counsel in his habeas proceedings and (b) is incompetent to be executed. Now if these facts turn out to be true and Mr. Kelly is in fact, incompetent, then (a) he might get equitable tolling on that basis and (b) ...

Judge Fernandez: Why don't we take (a) and (b) separately. (b) is fairly simple, isn't it? (b) You can't bring until a writ of execution issues. We've said that, California said that. If a

writ does issue, you have a California procedure to take care of the problem and you have access to federal courts to take care of the problems. So let's forget (b).

Neuhoff: I'd like to address that at some point, however.

Judge Fernandez: Discuss it now.

Neuhoff: Well number one is, the state has not given in on that one. They are asking for a cert petition on that. So we can't . . . .

Judge Fernandez: It's the law of this circuit at this point.

Neuhoff: But if the U.S. Supreme Court were to decide differently, Mr. Kelly would be hung and strung out there to dry.

Judge Fernandez: Well, if the Supreme Court decided differently, then he would be strung out to dry and that would be the end of that, wouldn't it?

Neuhoff: But we wouldn't want to ...

Judge Fernandez: But were not gonna, it wouldn't even matter if the Supreme Court decided differently, would it? You have a California, a separate California procedure to argue incompetence to be executed once a writ issues, correct?

Judge Fernandez: If you don't know that to be correct, just assume with me for a moment . . . that I'm correct.

Neuhoff: (unt) I will assume that it's correct.

Judge Fernandez: There is a special California procedure that takes care of that problem. Let's guess that for a moment. And if there is then maybe you don't have a problem anyway. In terms of branch (a): that sounds to me like an almost purely legal question. <u>The question that was actually presented to the California Supreme Court at one point is: if a person is incompetent to aid counsel in post-conviction proceedings, should or are the proceedings tolled</u>.

Neuhoff: Okay.

Judge Fernandez: That's a straight legal question. It doesn't even need any facts developed, does it? If we assume he is incompetent.

Neuhoff: If you assume he's incompetent.

Judge Fernandez: Assume he's incompetent. Now you are asking a legal question, are you not?

Neuhoff: Yes.

Judge Fernandez: Okay, so why don't you answer the legal question.

Judge Fernandez: And the answer to that is (giggle)

Neuhoff: Sorry?

Neuhoff: And the answer is?

Judge Fernandez: Yeah!, why don't you answer that legal question.

Neuhoff: Well, the answer is that he has right to be competent through the proceedings to assist his counsel. He may ... that particular issue wasn't brief in any depth before the court, for this Court it was briefed I think to some extent in the district court.

Judge Fernandez: Okay, well, the issues before us would have to be the ones that were before the California Supreme Court on direct appeal, correct?

Neuhoff: Not to, well, the issue before the California Supreme Court was whether he was incompetent to proceed in front of that court at that time.

Judge Fernandez: No, no, we're assuming that he is incompetent. We're all just going to, at least...

Neuhoff: You mean the substantive issues beyond ...

Judge Fernandez: In my present frame of mind, I will assume he is incompetent, Okay?

Judge Fernandez: Let's say he's incompetent. The only issues that can be raised in this habeas corpus are issues that have been disposed of by the

California Supreme Court on a direct appeal, is that correct?

Neuhoff: No.

Judge Fernandez: All right? What other issues?

Neuhoff: Under the McClesky case, we have an obligation to raise all claims, even claims that we were not able to develop in the California Supreme Court.

Judge Fernandez: Those have never been presented to the California courts on post-conviction relief, have they?

Judge Fernandez: (Ergo), they would be what, what do we call them? Unexhausted? Wouldn't they be unexhausted?

Neuhoff: You're putting us into a Catch 22 in that situation, are you not? When you say, we have to raise all claims but we never have an opportunity to do it?

Judge Fernandez: Oh you do. Go to California and raise your unexhausted claims.

Neuhoff: But we can't develop the claims and McClesky said we have the right to develop them and McFarland said he has the right to federal counsel to develop them and just last term in the case involving the bribed judges, the U.S. Supreme Court indicated you have the right to, in federal court, develop new claims.

Judge Fernandez: Let me ask. You're saying that, your reading of the current state of habeas corpus law is that, counsel has no obligation to exhaust purported claims in the California court system or to have them procedurally defaulted, whichever it is, before counsel comes to the federal court? That's how you read the law as it now stands?

Neuhoff: No. But...

Judge Fernandez: Well, then, if you have new claims, should they not be exhausted in the California court system?

Newhoff: When we get, yes. Once we get new claims, they will have to be exhausted. But McClesky gives us a right in federal court to do that which the state court denied us the right to do, which was develop claims and facts.

Judge Fernandez:: How did the state court deny you that right?

Neuhoff: Huh . . .

Judge Fernandez: On direct appeal, they said, hey, this isn't a direct appeal question. Develop it on post-conviction relief if you want to.

Neuhoff: Right. They don't, right, they don't...they did not...I'm intimately familiar with the state court record, so I would be . . .

Judge Fernandez: Okay, but tell me your federal point, though. We're talking now about a claim, let's say a good, let's just give it everything we can. The guy is incompetent and there is or may be a good federal constitutional claim out there, Okay?

Neuhoff: Right.

Judge Fernandez: And that claim has never been presented to the courts of the State of California or attempted to be presented.

Neuhoff: That's right.

Judge Fernandez: Okay? Now tell me ...

Neuhoff: That does not mean...

Judge Fernandez: Tell me, Tell me how you get that heard in federal court.

Neuhoff: The normal process would be. Well the first you have to discover the claim and that's where McClesky and those cases give us a right in federal court to discover the claim. Once we have discovered the claim ... and that's where we are now. Once we have discovered the claim, at that point, either that claim will have to go back and be litigated in state court before it can be decided on the merits in federal court, if it ever gets back to federal court.

Neuhoff: I don't think I said anything that is controversial, have I?

Judge Fernandez: So the denovement of that line of reasoning is if we can demonstrate or forget it. We have demonstrated let's say. He is incompetent.

Judge Fernandez: Ergo, we can, we can have a stay and we can stay all proceedings as long in the future as it takes for him to become competent again, so without ever presenting a habeas corpus claim to the federal courts, we can stay all state proceedings for the indefinite future until Mr. Kelly becomes competent. That, I think, is way you are saying, is that right?

Neuhoff: I don't know that we are saying it's indefinite, but I don't . . . I haven't heard.

Judge Fernandez: What's definite?

Neuhoff: Excuse me?

Judge Fernandez: What's definite or indefinite. I'm saying indefinite in the sense that he is not competent. According to him, he has not been competent since at least 1985, and he's not competent in 1997 and if I understand your position, I just want to get your position.

Judge Fernandez: Your position is, if he's not competent in the next 30 years, this stay should still remain in effect because for the next 30 years he still won't be competent to help counsel develop an unknown constitutional claim, correct?

Neuhoff: Well, number one, I guess number one is, the fact that he is mentally incompetent now, does not mean that he, under medication he could not be rendered competent.

Judge Fernandez: Sure, he might become ... but indefinite.

Neuhoff: That's a factual question that I assume is being part of the evidentiary hearing that is coming up. So you are asking me to assume the answer to a factual question I don't know.

Judge Fernandez: No, I'm just saying its indefinite. We don't know when he will be come competent but until he does, the stay should remain in effect, correct?

(silence)

Neuhoff: Can I have a second to talk to my co-counsel because this is ... I was hired for the limited purpose of the 848 subdivision (a)6 issue, not the big question, here. I don't want to say something that is inconsistent with their position, if you don't mind.

Judge Fernandez: Okay, why don't you take a minute. The time is running but take your time.

Neuhoff: The answer is yes.

Judge Fernandez: Okay, thank you.

Judge Tashima: Mr. Neuhoff, let me just pursue a related line of inquiry with you. First of all, you agree with Mr. Motley that the district court's order is not that the statute of limitations is tolled but that the Act does not apply?

Neuhoff: No.

Judge Tashima: You don't agree with that?

Neuhoff: No.

Judge Tashima: Well, how do you interpret the order?

Neuhoff: He just simply said what the court read to him which Your Honor read to him. He didn't say the Act...

Judge Tashima: Well, that the filing deadlines do not apply? What does mean, that the filing deadlines do not apply? That means it's tolled? Is that the way you read it?

Neuhoff: That's one possible ... that's, that's

Judge Tashima: Well, how do you read it? What do you think is the reasonable interpretation that we should give that, give that order?

Judge Tashima: What does it mean to you?

Neuhoff: Yes, it should be tolled.

Judge Tashima: Tolled?

Neuhoff: But it doesn't matter because ... if there are any grounds to support...

Judge Tashima: Why doesn't it matter?

Neuhoff: Because if there are any grounds to support what the district court did, even though not specifically relied on...

Judge Tashima: Well, is one ground one way to support the order that the statute is tolled?

Neuhoff: Yes.

Judge Tashima: All right, now. Tolled because of incompetency. In other words, that he can't, he can't aid his counsel, is that the basis for the tolling or what is it?

Neuhoff: The basis for the tolling is so that we can inquire into incompetency, yes.

Judge Tashima: All right, now.

Neuhoff: So we can make a decision whether he is incompetent or not and therefore, at that point, if he's not incompetent, we don't have to address the legal issues that ... Judge Fernandez was bringing up earlier.

Judge Tashima: First. The district court never made a finding, at least not so far, that Kelly is incompetent, right?

Neuhoff: That's right.

Judge Tashima: So, the only basis for the tolling would be to make an inquiry into whether or not he is competent.

Neuhoff: Yes.

Judge Tashima: Now that inquiry has been going on for what, two years or something like that? Several years?

Neuhoff: I think the doctor's report was early 95' if I'm right. And so, yes.

Judge Tashima: Well, you've had the proceedings stayed for over four years.

Neuhoff: But I don't know that there has ever been an objection on the Attorney General's point to the pace of the proceedings over that issue.

Judge Tashima: So then, you ... it's your position that the . . . it's a proper interpretation of the Anti-Terrorism Act that the statute of limitations can be tolled to inquire whether or not a putative habeas petitioner is competent to assist his counsel to prepare a petition? Right?

Neuhoff: Yes.

Judge Tashima: And then following up on that. If the court finds that yes, he is incompetent to that degree, then it should be further tolled until he becomes competent. However long that takes.

Neuhoff: Yes.

Judge Tashima: Simple, . . . (giggle)

Neuhoff: Let me go back a second to the applicability Act because I want to just get to the merits of that point. If it takes five minutes, I only have a minute left, so I'll either talk fast or I'll . . . the red light will come on.

Neuhoff: But let me just say a couple of things. This is really an issue of statutory interpretation. It's what does Congress mean in Section 107(c) of the Act by cases pending, because Lindh told us that's the dispositive issue in the case. The 1996 Act uses the word applications and petitions throughout. Yet, it chose to use, but it didn't say petitions pending in the retro-activity section. It said cases pending. It chose the word cases over the word applications and petitions that it used throughout the Act and it did so for a reason. And the reason is very clear, McFarland was decided just a year before that language got added to the Act and it said capital habeas cases can begin without the filing of a habeas corpus petition, so

Congress knew if it wanted to, say petitions, if it really wanted, or intended to mean petitions pending, it would have to say it or applications pending because McFarland just told them that.

Number two. There are statutes throughout the Act. There are four places in the Act where Congress used the word cases juxtaposed in the same sentence with the word application, and each one of those usages shows that the word cases is broader than the word applications. They are not synonymous terms.

Judge Fernandez: Counsel you are over your time. Why don't you take about 30 seconds or so to sum it up. Much of this argument is in your brief, I think.

Neuhoff: Right, it is in the brief. It's at some length.

Let me just say if there is no case pending, then what has been going on for the past two years. I mean there is something going on in the district court for the last two to four years and it's a case, it's not a petition, it's a case and that's just the words that Congress used when an appeal is filed before this court, the appeal is pending even before an opening brief is filed. And that is directly analogous here. The case was pending even though a petition hadn't been filed.

Thank you, Your Honor.

Motley: Just briefly, Your Honor. The court in Beeler granted equitable tolling to insure that the defendant in that case would have the assistance of counsel for a period of a year during which he could litigate his habeas matter.

In this case, Mr. Kelly has had counsel for over four years and they have not filed a petition. It would be no justification for equitable tolling because any issue that could be raised in the future could have been raised in the past, because we are dealing with just those issues that have been exhausted before the California Supreme

Court. To the extent that he is saying, there are issues that may never be discovered in the future; therefore, I need indefinite equitable tolling. Well, any petitioner could come in and say, there may be newly discovered evidence at some point in the future, therefore, stay this case indefinitely.

Unless the court has any questions ... (unt)

Judge Fernandez: Thank you counsel. We thank all counsel for argument and this case will stand submitted at this time and we will be in recess.

APPENDIX 4

FILED
CLERK, U.S. DISTRICT COURT
JUN - 3 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

United States District Court
Central District of California
Western Division

HORACE EDWARDS KELLY,
Petitioner,

v.

ARTHUR CALDERON, *etc.*,
Respondent.

CV 98-2722 TJH
CV 98-2723 TJH

Order

The Court has considered Petitioner's motion for equitable tolling, *ex parte* application to shorten time for the motion for leave to file an amended petition, motion for leave to file an amended petition, and motion to stay execution, together with the moving and opposing papers.

It is Ordered that the motion for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity.

It is further Ordered that the *ex parte* application to shorten time for the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion to stay Petitioner's execution be, and hereby is, Granted.

It is further Ordered that Petitioner's execution be, and hereby is, Stayed pending a final resolution of his petitions.

Date: June 3, 1998

Terry J. Hatter, Jr.
Chief United States District Judge